Supreme Court, U.S.
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92-1068

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

The City of South Sioux City, Nebraska,

A Nebraska Municipal Corporation, Petitioner

v.

Sioux City Foundry Company,

An Iowa Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals sitting in this diversity case correctly applied the doctrine of *Erie v Tompkins* when it held that the Nebraska legislature had granted South Sioux City an implied power to make a contract setting its customer electric rates, contrary to a Nebraska Supreme Court decision which holds that utility rate contracting power could not be granted by implication, but must be expressly granted instead.

TABLE OF CONTENTS

	Page
Question Presented	i
Tables	ii
Reports of Decisions	v
Jurisdiction	vi
Statutes Involved	vii
Statement of the Case	1
Reasons for Granting the Writ	5
Conclusion	16
Appendix	17

TABLE OF AUTHORITIES CITED

Page

Bernhardt v Polygraphic Company of America, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956) 5, 6

Brockett v Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) 6

Carr v Fenstermacher, 119 Neb. 172, 228 N.W. 114 (1929) 12

Chase v Douglas County 195 Neb. 838, 241 N.W.2d 334 (1976) 14

Christensen v City of Fremont 45 Neb. 160, 63 N.W. 364 (1895) 15

City of Seymour v Texas Electric Service Co. 66 F.2d 814, (5 Cir., 1933) 13

City of University Place v Lincoln Gas & Electrict Light Co., 109 Neb. 370, 191 N.W.2d 432 (1922) 12

Connett v City of Jerseyville 110 F.2d 1015, (7 Cir., 1940) 13

Consumers Coal v City of Lincoln 109 Neb. 51, 189 N.W. 643 (1922) 10, 15

El Paso Electric v Federal Energy Regulatory Comm'n. 667 F.2d 462, (5 Cir., 1982) 14

Erie v Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 6

Home Telephone & Telegraph Co. v City of Los Angeles 211 U.S. 265, 53 L.Ed. 176, 29 S.Ct. 50 (1908) 7, 11

Marquis v Polk County Telephone Co. 100 Neb. 140, 158 N.W. 927 (1916) 7, 10, 11

McGinley v Wheat Belt Public Power District, 214 Neb. 178, 332 N.W.2d 915 (1983) 9

Munn v Illinois 94 U.S. 113, 24 L.Ed. 77 (1876) 11

Nucor Corp. v Nebraska Public Power District, 891 F.2d 1343 (8 Cir., 1989) 8

Omaha Water v City of Omaha, 147 F. 1 (8 Cir., 1906) 13

Railroad Commission of California v Los Angeles Ry. Corp. 280 U.S. 145, 74 L.Ed. 234, 50 S.Ct. 71 (1929) 11

Scott Paper Co. v City of Anacortes, 90 Wash.2d 19, 578 P.2d 1292 (Wash.Sup.Ct., 1978) 13

St. Cloud Public Service v City of St. Cloud, 265 U.S. 352, 44 S.Ct. 492, 68 L.Ed. 1050 (1924) 13

T.V. Transmission v City of Lincoln , 220 Neb. 887, 374 N.W.2d 49 (1985) 12

United Community Services v The Omaha National Bank 162 Neb. 786, 77 N.W.2d 576 (1956) 10

REPORTS OF DECISIONS

The decision of the District Court is not reported.

The decision of the Court of Appeals is reported at 968 F.2d 777.

JURISDICTION

Petitioners seek review of the Judgment of the United States Court of Appeals for the Eighth Circuit issued July 10, 1992. A timely petition for rehearing was filed with the Eighth Circuit and was denied by an order entered September 3, 1992.

The jurisdiction of the Supreme Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES INVOLVED

Nebraska Revised Statutes 1943 (Reissue of 1991)

Section 16–201. General powers. Each city of the first class shall be a body corporate and politic and shall have the power …(4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers,….

Section 16–674. Acquisition of plants or facilities; condemnation; procedure. The mayor and city council shall have power to purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate for the city any such … electrical distribution facility, electric or other light works,….

Section 16–684. Construction; operation; location; eminent domain; procedure. When the system of … power,… shall have been adopted, and the people shall have

voted to borrow money to aid in the construction as aforesaid, the mayor and council may erect and construct and maintain such … power plant, …, make all needful rules and regulations concerning their use, and do all acts necessary for the … management and control of same not inconsistent with law, ….

STATEMENT OF THE CASE

Sioux City Foundry Company, an Iowa corporation, [SCF] brought this action for declaratory and injunctive relief and damages alleging that a contract made between SCF and the City of South Sioux City, Nebraska, a municipal corporation and city of the first class, [City] was valid and it had been breached by the City. The jurisdiction of the district court was invoked under 28 U.S.C. Sec. 1332 because of diversity of citizenship, the plaintiff being an Iowa corporation and the defendant being a Nebraska municipality.

Briefly, the contract dealt with the City, as a distributor of electric power, supplying electricity to SCF for a term of twenty three years. The agreement was the result of SCF ' s search for a site for a plant in 1968. The city council on Christmas Eve in 1968 at a special meeting passed a resolution approving a contract between the City and SCF. City at that time owned and operated, and continues to own and operate, its own electrical distribution system within the

City. [Nebraska is an all public power state.] The City buys wholesale power from a wholesale supplier, a public power district, and distributes the power to residents and businesses in the City.

SCF claimed that the City had breached the contract by the city council's action in declaring the contract null and void and placing SCF under the Large Light and Power rate classification, and that the City was estopped to deny the contract's validity.

A part of the approved contract established a procedure for setting rates for the electricity to be provided. This procedure was to be followed for the entire twenty-three year term of the contract. The rate setting procedure permitted the City to flow through to SCF certain, but not all, wholesale costs. Following the approval and execution of the contract in 1969, SCF constructed a foundry in the City. The parties operated under the contract until 1977.

The rate modification portion of the contract was amended in 1977 after the wholesale supplier substantially changed its method of allocating costs. The retail rate that resulted from applying the existing provisions in the 1969 contract increased the charges made by the City to SCF significantly. The parties altered the formula for determining the rate to be charged to SCF and extended the term of the contract until 2002 in an addendum signed in 1977.

In 1987 the City was advised by its consulting engineers that the rate being charged to SCF was insufficient to cover the City's costs in supplying the power to SCF. This resulted from increases in demand charges [a component of the total charge] made by the wholesale supplier, which increases could not be passed on to SCF because of restrictions in the contract. In March 1989 the engineers reported to the City that "For fiscal year 1988, the cost of service tto SCF was $537,004 compared to revenues received of $337,301." This requires that all other ratepayers within the City make up this deficiency because of the nature of municipal ownership of the electric utility.

At its meeting on April 4, 1989, after being advised by the city attorney, the city council passed a resolution declaring the contract with SCF "null and void" and placed SCF under the appropriate rate within the City's published rate schedule. The City then billed SCF under the "Large Light and Power" rate, which resulted in increased charges to SCF averaging $20,000 per month. No part of this additional charge has been paid by SCF, although there was testimony that the amounts had been placed in a separate bank account pending the result of the litigation.

SCF then filed this action. Upon motion by SCF, the district court entered a preliminary injunction preventing the City from attempting to collect the amounts due under the higher rates. SCE then moved for a summary judgment. The district court reversed its position and denied the motion for summary judgment and dissolved the preliminary injunction. The court determined that there was no specific statutory authority for the City to enter into a contract restricting its legislative power to set rates. The contract was, therefore,

ultra vires and void. SCF appealed from the order dissolving the preliminary injunction.

A panel of the Eighth Circuit Court of Appeals reversed the district court and found the contract to be valid. The Circuit Court panel determined that under Nebraska law the City had the "implied power to enter into long-term contracts with the City's electricity customers that include rate terms." The City petitioned for a rehearing en banc, which was denied by an Order dated September 3, 1992, with Judge Arlen Beam from Nebraska voting in favor of the rehearing.

REASONS FOR GRANTING THE WRIT

This Court has a primary interest in assuring that a federal court enforcing state law in a diversity case is, in effect, sitting as another court of the state. *Bernhardt v Polygraphic Company of America,* 350 U.S. 198, 203–204, 76 S.Ct. 273, 276–277, 100 L.Ed. 199 (1956). In this case, the district court

entered a reasoned judgment based on well–understood principles of Nebraska law that are consistent with the other states. The Court of Appeals reversed the district court on the basis of its interpretation of three Nebraska statutes, but its interpretation is directly contrary to a Nebraska Supreme Court decision which was in turn based on a decision of this Court. The Court of Appeals decision establishes precedent in Nebraska that will affect not only these litigants, but also the political subdivisions across the state.

Petitioner acknowledges that this Court normally defers to interpretations of state statute given by the lower federal courts, but this "rule is not ironclad…and (this court has) authority to differ with the lower federal courts as to the meaning of a state statute." *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). Moreover, the Court will grant certiorari to determine whether the doctrine of *Erie v Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) was correctly applied by the Court of Appeals. *Bernhardt v Polygraphic Company of America,* supra.

The Court of Appeals has erroneously interpreted Nebraska statutes in this case. In reversing the district court, it rejected South Sioux City's claim that its 1968 city council had not been empowered by the Nebraska legislature to make the disputed contract. The Court of Appeals based its decision on the premise that city authority to make the contract was "implied" by statutes that create a general city power to make contracts. This decision is directly contrary to the Nebraska Supreme Court's decision in *Marquis v Polk County Telephone Co.* 100 Neb. 140, 158 N.W. 927 (1916), in which the court held that a city's general power to make contracts does not imply that the city has the power to make a utility rate contract. The *Marquis* decision was in turn based on this Court's decision in *Home Telephone & Telegraph Co. v City of Los Angeles* 211 U.S. 265, 53 L.Ed. 176, 29 S.Ct. 50 (1908), holding that the authority of a city to surrender its utility rate regulatory power, by making a long–term rate contract, is not implied by the grant of general contract powers. These cases hold that such power, if it exists, must be expressly granted to the governmental subdivision by the

legislature. *Marquis*, supra., has not been reversed or modified. Thus the Nebraska law on this subject seemed, until now, to be settled.

This Court of Appeals decision will influence more than the claims of these parties. It will interact with the Court of Appeals ruling in *Nucor Corp. v Nebraska Public Power District*, 891 F.2d 1343 (8 Cir., 1989) to establish a new line of authority regarding the Nebraska public power systems. In *Nucor*, the Court upheld a federal jury verdict awarding money damages to an electric customer for breach of an electricity supply contract. In that contract the utility had agreed to follow statutory rate–making standards but did not fix the rate itself in the contract; no claim was made that the contract itself was invalid. The holding in this case is that political subdivisions have implied power to make customer rate contracts that fix the rates themselves, rather than merely incorporating by reference the utility's well understood duties to make fair, reasonable, and nondiscriminatory rates. Taken together, these two decisions mean that every public power entity in Nebraska now faces claims by electricity customers

asserting that their rates are fixed by contract, a matter which has heretofore been generally considered a legislative or regulatory function of the electric entities in this state. *McGinley v Wheat Belt Public Power District*, 214 Neb. 178, 332 N.W.2d 915 (1983).

The Court of Appeals reasoned as follows. Governmental subdivisions in Nebraska are granted either express or implied powers by the Legislature. South Sioux City has the general power to make contracts under Section 16–201(4), and the general power to own and operate an electric utility under Sections 16–674 and 16–684, Nebraska Revised Statutes 1943. These powers do not expressly declare that the city may make rate–fixing contracts with electric customers nor do they expressly forbid it. The Court of Appeals held that the power to make a customer rate–fixing contract was implied by these statutes granting the city these general powers. As a result, the contract in contention was upheld.

The flaw in this reasoning lies in its central principle that a governmental subdivision may have an "implied power" to

make a public utility rate contract "in the absence of conflicting legislation." (slip opinion p. 8) As petitioner has already stated, the Nebraska Supreme Court ruled in 1916 that the power to make a rate contract is not implied by a municipality's general contract powers or police powers. *Marquis v Polk County Telephone Co.,* supra. The law creating a municipality and conferring powers upon it, whether it is a home rule charter or enabling legislation, is a grant of power, not a limitation on power. *Consumers Coal v City of Lincoln* 109 Neb. 51, 189 N.W. 643 (1922). Cities only have the powers expressly granted to them, or necessarily implied in the grant; conversely, powers not granted are implicitly prohibited. *United Community Services v The Omaha National Bank* 162 Neb. 786, 77 N.W.2d 576 (1956) This body of Nebraska law is in direct conflict with the Court of Appeals holding in this case. The Nebraska Supreme Court has never held that Nebraska cities possess general powers "in the absence of conflicting legislation."

Nebraska's rules on municipal powers interact in this case with the law on utility rate regulation. As a general rule, the

power to establish rates to be charged the public for essential services resides initially in the State Legislature. *Munn v Illinois* 94 U.S. 113, 24 L.Ed. 77 (1876) The Legislature may delegate this power to a municipality but its decision to do so, particularly an asserted delegation of a power to make long–term rate rate contracts, must be clear and explicit. *Home Telephone & Telegraph Co. v City of Los Angeles,* supra.; *Railroad Commission of California v Los Angeles Ry. Corp.* 280 U.S. 145, 74 L.Ed. 234, 50 S.Ct. 71 (1929). Nebraska recognizes these rules, and adopted them in *Marquis,* supra. In doing so, the Nebraska Supreme Court recognized that changed circumstances might render a utility rate unfair to either the consuming public or the utility, and the existence of a rate–fixing contract might preclude appropriate regulatory action. *Marquis,* supra, 100 Neb. at 143. Thus, the Nebraska law requires that the power to make such a contract must be expressly delegated by the Legislature. And, contrary to the result reached by the Court of Appeals, no Nebraska statute expressly delegates this power to South Sioux City.

The Court of Appeals cited several Nebraska decisions as precedent for its ruling. But these cases involve either agreements with franchise utility companies, *City of University Place v Lincoln Gas & Electrict Light Co.*, 109 Neb. 370, 191 N.W.2d 432 (1922), or agreements with contracting parties for business matters that do not concern rates charged to the general public consumers of electric utility service.*T.V. Transmission v City of Lincoln* , 220 Neb. 887, 374 N.W.2d 49 (1985); *Carr v Fenstermacher*, 119 Neb. 172, 228 N.W. 114 (1929). None of them applied or interpreted the statutes on which the Court of Appeals relied, or any comparable statutes, to a claimed customer rate contract. Thus, these cases are distinct from this action, and do not establish precedent for the decision.

Much of the precedent in this area involves municipal regulation of utility companies, rather than a city's regulation of its own utility as in South Sioux City's case, and this point was a focus of attention in the lower courts. But that difference does not yield a different result. Cities regulating rates to be charged to the customers of a city–owned utility

are performing the same public regulatory function as cities regulating the rates charged by utility companies. *City of Seymour v Texas Electric Service Co.* 66 F.2d 814, 817 (5 Cir., 1933); *Connett v City of Jerseyville* 110 F.2d 1015, 1019 (7 Cir., 1940) In each instance, the public interest in fair utility rate regulation is the same, and thus the public policy concern that militates against long term rate–setting contracts is also the same.

In fact, agreements fixing rates for years are upheld when, by making the agreement, the municipality is able to induce a utility company to establish the community's service in the first place, *Omaha Water v City of Omaha*, 147 F. 1 (8 Cir., 1906); *St. Cloud Public Service v City of St. Cloud*, 265 U.S. 352, 44 S.Ct. 492, 68 L.Ed. 1050 (1924), or to arrange financing so the community itself can provide its utility service. *Scott Paper Co. v City of Anacortes,* 90 Wash.2d 19, 578 P.2d 1292 (Wash.Sup.Ct., 1978). Such agreements are not otherwise upheld, as the district court found in this action.

The change brought about by the Court of Appeals ruling will be immediate. In the early years of the contract, there were few problems regarding the rate, and these were apparently resolved in 1977. But since then city overhead costs have increased, and the city's wholesale electric supplier has changed its method of calculating its charges. The contract prevents the city from passing these along to this customer. The other electric customers, homeowners and businesses in the city, have to make up the difference by paying higher charges. This situation creates a subsidy to a private industry that is forbidden under the Nebraska Constitution, *Chase v Douglas County* 195 Neb. 838, 241 N.W.2d 334 (1976), and illegally forces one class of utility customer to subsidize another. *El Paso Electric v Federal Energy Regulatory Comm'n.* 667 F.2d 462, 468 (5 Cir., 1982)

Furthermore, the ruling creates new law for Nebraska governmental subdivisions. The Nebraska Supreme Court's narrow interpretation of the concept of implied municipal powers has historically meant that cities may not do many things which might be considered only possible, as opposed

to necessary. For example, a city was authorized by its charter to provide heat to its citizenry, but the Nebraska Supreme Court held that did not authorize it to sell heating fuel.*Consumers Coal v City of Lincoln,* supra. Another city was authorized by statute to illuminate its streets, but the Nebraska Supreme Court held that the statute did not authorize it to sell electricity to its citizens. *Christensen v City of Fremont* 45 Neb. 160, 63 N.W. 364 (1895). The Court of Appeals ruling in this case means that Nebraska's municipalities have implied powers to perform acts which are not objectively necessary to carry out city functions.

It is virtually impossible to draft legislation forbidding the exercise of all the powers someone may think are implied by a statute. At least it seems likely that Nebraska's public power industry faces the prospect of the assertion of implied contract restrictions on their regulatory powers by customers all over the state. State courts may be placed in the position of choosing whether to follow the Federal Court rule or the state court rule, a situation which ought not to exist. Litigants may seek a choice of forum based on these differing

interpretations of state law. These are among the consequences of this ruling, all of which go beyond its immediate impact to these litigants, and indicate the need for further examination of this case by this Court.

CONCLUSION

Because of its importance to the citizens of the City of South Sioux City, and to the public electric utility entities in Nebraska, the holding in this case should be reviewed on certiorari by this Court.

RESPECTFULLY SUBMITTED
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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

SIOUX CITY FOUNDRY COMPANY,	* CV 89-L-470
Plaintiff,	*
vs	*
CITY OF SOUTH SIOUX CITY,	*
NEBRASKA,	*
Defendant and	*
Counterclaimant,	*
ERNEST ALBERTSEN, et. al.,	*
Third Party	*
Defendants.	*

MEMORANDUM AND ORDER ON

PLAINTIFF'S MOTION FOR SUMMARY

JUDGMENT AND THIRD-PARTY DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT

Facts

Sioux City Foundry (foundry) is an Iowa corporation with its foundry operations located in South Sioux City, Nebraska.

The City of South Sioux City (city) is a Nebraska municipal corporation and a city of the first class in Nebraska. The city owns and operates an electrical distribution system which purchases electricity at wholesale rates and sells it to consumers at retail rates.

At some time prior to and/or during 1968, the foundry decided, for environmental reasons, to build a plant with an electric furnace. A stable supply of electricity would be a prerequisite to operating such a plant. The city, desirous of attracting new industry, and the foundry, desirous of obtaining a cheap, reliable, long-term source of electricity, discussed locating the foundry on land within the city. The foundry and the city entered into negotiations for a long-term electricity rate contract. The negotiations led to the conclusion of a 23-year contract for electric light and power service that provided a formula by which the city could adjust the rate charged to the foundry should the rate the city paid for electricity change.

On December 24, 1968, city attorney Wayne Boyd presented the city council with a resolution approving the contract, and the city council voted to adopt the resolution. The contract was executed by then mayor Ernest Albertsen and then foundry president Milton Galinsky. Both parties performed under the contract until 1977, when it was amended to further clarify how the contract rate would be adjusted in the future. The addendum was more specific than the 1968 contract and described in detail how the city and foundry would agree on future rate increases. The 1977 addendum also extended the contract 25 years from 1977, to expire in 2002.

Wayne Boyd, the city attorney, represented the city and recommended to the city council that the addendum be approved. In September of 1977, the city council approved the addendum and on the 16th of that month, then mayor Keith Ferris and then foundry president Milton Galinsky executed the addendum.

The contract and addendum remained in effect and were adhered to by both parties until April 4, 1989, at which time

city attorney Wayne Boyd informed the city council that the contract and addendum abridged the city's legislative authority to set rates. The city council voted to approve a resolution declaring the parties agreement null and void, and placing the foundry under the established large light and power rate. Prior to the April 4, 1989, city council meeting, the council and various city officials had concluded, based on the report of an engineering consulting firm hired by the city, that the city was losing money under its contract and addendum with the foundry.

Since April 4, 1989, the foundry has been billed at the large light and power rate established by city ordinance. The foundry has been paying the city only that amount it calculates it owes under the contract rate. The foundry has been placing the disputed difference in what it calls an escrow account.

The city threatened to disconnect the foundry's electric service if its full electric bill was not paid, but the foundry obtained a preliminary injunction from this court prohibiting

the city from cutting off the foundry's power until this case is resolved.

The foundry's third amended complaint (filing 48) has four causes of action. The foundry seeks: (1) a declaratory judgment that the contract and addendum are valid, binding obligations, (2) a determination that the city breached the contract and addendum, (3) a determination that the city and certain of its officers violated the Nebraska Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq., (Reissue of 1987 & 1990 Cum. Supp.), and (4) a determination that the city is estopped from denying the validity of the contract and addendum.

The city has counterclaimed (filings 8 and 63) seeking in excess of one and a half million dollars that it claims is an underpayment for electric service provided to the foundry since 1969 that was not billed under the special foundry rate.

In response to the counterclaim, the foundry initiated a third-party action (filing 12) seeking indemnification and damages from various city officials and representatives for any costs,

fees, or judgments levied against them by virtue of the city's counterclaim. Furthermore, the foundry alleges the third-party defendants violated the Nebraska Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.).

The foundry has filed a motion for summary judgment (filing 88) on it's first, second, and fourth causes of action. There is extensive deposition testimony from electrical engineering consultants who were hired by the city on or about 1986 or later to review the foundry rate, as well as deposition testimony from many relevant parties and nonparties to this suit.

Discussion

First and Second Causes of Action -- Are the Contract and Addendum Valid, Binding Obligations, and If So, Did the City Breach Them

It is a thoroughly settled principle of law that the regulation of rates for electricity, water, or some other utility, is a

legislative act, and one council may not, by contract or otherwise, deprive successive councils of such power. 12 McQuillin, Municipal Corporations (3d ed.) 607-09, § 35.37; 10A McQuillin, Municipal Corporations (3d ed.) 42-43, § 29.101; (council presently holding legislative or governmental powers "is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.") 56 Am. Jur. 2d Municipal Corporations §§ 154, (1971); ("a municipal contract will generally be declared void if there has been an abuse of power or discretion on the part of the municipal authorities executing it") Id. at § 495; (municipality cannot make contracts that will control its legislative duties or amount to an abrogation of its governmental function) 63 C.J.S. Municipal Corporations § 979c (1950); (governing body of a municipal corporation may not by contract bind its successors in their exercise of legislative functions) Id. at § 987.

There is no noteworthy disagreement in the courts with the above-mentioned rule. See, Springfield Gas & Elec. Co. v.

Springfield, 257 U.S. 66, 70 (1921) (municipality's setting of rates was held to be a legislative act); Jorgensen Co. v. City of Seattle, 665 P.2d 1328 (Wash. 1983), cert. denied, 464 U.S. 982 (1983) (municipality's setting of rates is a legislative act); Freeport Water Co. v. Freeport City, 180 U.S. 587, 598-99 (1901) ("power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant"); Connett v. City of Jerseyville, 110 F.2d 1015, 1019 (7th Cir. 1940) (municipal governing body, when fixing utility rates, performs public function as distinguished from private function as owner and operator of utility); San Francisco-Oakland Terminal Rys. v. City of Alameda, 226 F. 889, 891-92 (N.D. Cal. S.D. 1914) (statute conferring power upon city to regulate rates and not indicating a legislative purpose to restrict that power, shows that city was unauthorized to bind itself by contract); Johnson v. State of Georgia, 128 S.E.2d 651, 655 (Ga. App. 1962) (contract specifying electrical rates municipality must charge customer, as well as provisions by which rate can by raised to ensure system stays financially sound, held ultra vires and

void as fettering council's legislative discretion without express statutory permission).

While legislative councils cannot lawfully contract in such a manner as to bind the legislative abilities of subsequent councils, absent statutory language clearly allowing such contracts, councils can contract when acting in a proprietary manner. With the exception of setting rates, a municipal corporation generally acts in a proprietary manner in operating a municipal utility. Johnson, 128 S.E.2d at 654. Business contracts that do not infringe legislative rate regulation may be entered into by municipal corporations. City of Des Moines v. City of West Des Moines, 30 N.W.2d 500, 505 (Iowa 1948). Contracts abridging the legislative function of a governing body can validly exist, but only if authorized by statute. Id. at 507.

Municipal utilities may generally enter into contracts that are incident to municipal ownership of such a plant and which are necessary to render the system efficient and beneficial to the public. 12 McQuillin, Municipal Corporations (3d ed.)

562, § 35.32. See also, 10A McQuillin, Municipal Corporations (3d ed.) 43, § 29.101 (contracts for public utilities, i.e., electricity supply, are generally considered business affairs of the municipal utility). Specifically, a municipal corporation can contract to purchase electricity, 12 McQuillin at 562, § 35.32, and such a contract can extend beyond the term of office of the officers making the contract, subject only to a reasonable length of time. Johnson, 128 S.E.2d at 654.

The reasoning for allowing contracts to purchase electricity is based in the public interest. The Johnson court concluded that a long-term contract ensuring the supply of electricity was reasonable "in view of the fact that electricity must be in the wires at all times, ready to spring to service at the flick of a consumer's switch and counted upon to be available all the time it is being used." Id. See also, Sampson v. City of Cedar Falls, 231 N.W.2d 609, 613 (Iowa 1975) (city council, in contracting and binding future city councils in order to procure an adequate supply of electricity for consumers, executes a public function).

In Citv of Crosbyton v. Texas-New Mexico Utilities Co., 157 S.W.2d 418, 420-21 (Tex. Civ. App. 1942), a municipality validly contracted to procure power essential to the operation of its public utilities, but no attempt was made to regulate the rates. Such a contract validly precluded future administrations from contracting for or acquiring power from any other source. Id. at 420. In Omaha Water Co. v. City of Omaha, 147 F. 1 (8th Cir. 1906), appeal dismissed, 207 U.S. 584 (1907), the court found that the legislature "intended to grant, and did grant to the city of Omaha, by apt words and in unmistakable terms, the power to make an unalterable contract regarding the water rates." Id. at 13. The Eighth Circuit concluded that

> [t]he power to regulate rates of water, gas, transportation, and other public utilities partakes of the nature of a governmental and of a proprietary power whose exercise may be suspended for a reasonable time by express grant or by contract. An agreement for such a suspension will not be raised by mere implication. Where the meaning of a grant or contract regarding such a suspension or regarding

> any public franchise or privilege is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain it will be protected and enforced.

Id. at 12.

It is clear then that a municipal utility acts in a proprietary manner in most all of its functions, with the notable exception of its rate-making function. Rate-making is a legislative function that cannot be delegated away absent a specific statutory provision. A legislative body acts in a proprietary manner when it contracts to purchase a supply of electricity because it is acting in the best interests of its customers/citizens and not abridging any rate-making function. This is in contrast to a contract to sell a supply of electricity at a set price, which is a contract that could potentially conflict with the legislative body's statutory authority to regulate and fix rates. Such a contract is repugnant to the statute, the legislative body, and its citizenry.

Having concluded that the rate-making authority of a city council is a legislative act that cannot be contracted away absent specific statutory language, I now turn to the applicable Nebraska statutes that govern this case.

Neb. Rev. Stat. §§ 16-681 and 16-682 govern the issues raised here. Section 16-681 states, in relevant part, that

> "[s]uch city owning, operating or maintaining its own gas, water, power, light or heat system, shall furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, subject to reasonable rules and regulations, with gas, water, power light or heat. It shall regulate and fix the rental or rate for gas, water, power, light or heat . . .."

That section must be read in conjunction with the subsequent statutory provision, § 16-682, which states, in relevant part, that

> "Such cities shall have the right and power to tax, assess, and collect from the inhabitants thereof such rent or rents for the use and benefit of water, gas, power, light or heat

used or supplied to them . . . by such gas, light or heat system, as the council shall by ordinance deem just or expedient. . . ."

First, these statutes contain mandatory language in that they state such cities "shall" act in a certain manner. Such commanding language cannot be dismissed as permissive. Neb. Rev. Stat. § 49-802(1) states "[w]hen the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed." See, Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 589, 239 N.W.2d 779, 780 (Neb. 1976); Freeport Water Co., 180 U.S. at 600. Second, both statutes apply specifically to municipal utilities, as opposed to public utilities which are covered by other statutes, most notably § 16-679.[1] Third, and most importantly, the commanding

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[1] Neb. Rev. Stat. § 16-679 was discussed and distinguished in the memorandum and order on plaintiff's motion for a preliminary injunction of December 19, 1990, filing 73, p. 5-6.

language on which this case turns specifically gives the city the authority to "regulate and fix the rental or rate" (§ 16-681) as well as "the right and power to . . . assess, and collect . . . such rent or rents for the use or benefit of . . . power, light or heat used or supplied . . . as the council shall by ordinance deem just or expedient." (§ 16-682).

It is clear that the state legislature has given cities operating municipal utilities the authority to set the rates for such utilities, to adjust those rates as it sees fit and, by ordinance, collect those rates from ratepayers. I find no language "by apt words and in unmistakable terms," Omaha Water Co., 147 F. at 13, that would allow the city to bargain away its legislative functions, and "[a]n agreement for such a suspension will not be raised by mere implication." Id. at 12.

On the first cause of action, I find that the law, as applied to the facts in this case, makes it clear that the City of South Sioux City had no authority to enter into a rate-setting contract with the foundry. The 1968 contract and the 1977 addendum abridge the legislative authority of the city

council. The city, which can only negotiate away its legislative powers via an explicit statutory grant of authority, possesses no such authority. Therefore, as a matter of law, the contract and addendum are ultra vires. Warren v. Stanton County, 145 Neb. 220, 226-27, 15 N.W.2d 757, 761 (Neb. 1944); T.V. Transmission Inc. v. City of Lincoln, 220 Neb. 887, 893, 374 N.W.2d 49, 54-55 (Neb. 1985). Summary judgment on the plaintiff's first cause of action, that the contract and addendum be declared valid, binding obligations, must be denied.

As for the second cause of action, since the contract and addendum are void, the city cannot be held to have breached them. There can be no breach of contract without a valid contract to be breached. Summary judgment on the plaintiff's second cause of action, a determination that the city breached the contract and addendum, will be denied.

Fourth Cause of Action -- Equitable Estoppel

The foundry's fourth cause of action, which is the last issue in its motion for summary judgment, seeks a determination that the city is equitably estopped from denying the validity of the contract and addendum. The foundation for an estoppel cannot be an illegal and void contract. Warren, 145 Neb. 220, 227, 15 N.W.2d at 761. The Warren court quoted the United States Supreme Court for the proposition that "when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it . . . . [N]othing which has been done under it, nor the action of the court can infuse any vitality into it . . .." Id., citing Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24, 61 (1891).

Furthermore, and specifically relating to the case at bar, a municipal corporation that invalidates a contract it never had any authority to make cannot be estopped so as to validate

the contract. Warren, 145 Neb. 220, 229, 15 N.W.2d at 762. The Warren court also noted that "[a] municipality cannot be estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no capacity to make the contract or where it was made in express violation of law." Id., quoting 3 McQuillin, Municipal Corporations (2d ed.), § 1358. Plaintiff's reliance on Hammer v. Dept. of Roads, 175 Neb. 178, 120 N.W.2d so9 (Neb. 1963), is misplaced. While that case discussed the concept of estoppel as it relates to a municipal corporation, it does not involve an ultra vires contract made by a municipal corporation, a key fact in the case at bar.

Third-Party Defendants' Motion for Summary Judgment

Sioux City Foundry (the foundry), the third-party plaintiff, filed a third-party action (filing 12) seeking indemnification and damages from various former and present officials of the City of South Sioux City (the city), for any costs, fees, or judgments levied against them by virtue of the city's

counterclaim in this suit. The foundry alleges fraud and violation of the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.), and the third-party defendants have filed a motion for summary judgment on both counts.

In Nebraska it is well settled that fraud cannot be based upon "misrepresentations of law or misrepresentations of matters of law. . .." Beltner v. Carlson, 153 Neb. 797, 802, 46 N.W.2d 153 (1951). The reasoning behind that rule is that everyone is presumed to know the law, both civil and criminal, and, at the very least, must take notice of it. Id. A person has no right to rely on the representations of another and will not be allowed to mount another's representations of law as a defense. Id. "As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely . . .." Id. See also, Abbott v. Abbott, 188 Neb. 61, 66, 195 N.W.2d 204 (1972).

Furthermore, one who deals with a governmental unit is "required to act with reference to the authority, limitations and restrictions imposed upon it by the legislation authorizing

the organization . . .." Lincoln & Dawson County Irrigation Dist. v. McNeal, 60 Neb. 613, 619, 83 NW 847, 849 (1900); Lindeman v. Calamus Irrigation Dist., 122 Neb. 1, 2-3, 238 NW 762, 763 (1931). While I note that there is some dispute over whether Milton Galinsky, the foundry's president, relied upon any representations made by any of the third-party defendants, his reliance or nonreliance does not excuse him or the foundry from knowing the law, especially when he is represented by counsel in potentially costly and important matters. The third-party plaintiff acknowledges in its brief that an action for fraud cannot be predicated upon representations of law, but states that a variety of exceptions have been recognized. The third-party plaintiff cites no cases to support these exceptions, nor have I been able to find any under Nebraska law. Therefore, the rule shall control.

Since the president of the foundry stated that he relied upon his own attorney, and not on anybody else, in negotiating with the city (deposition of Milton Galinsky, 17:8--18:14, 50:10--52:9, 53:12--55:19), I find that he cannot claim that the law was misrepresented to him by any third-party

defendant. For the same reason, I do not find that the parties were dealing with each other on unequal terms. The parties are all located in close proximity to the Iowa-Nebraska border and undoubtedly had dealings in both states. The foundry cannot now claim that as an Iowa corporation it is new to the law of Nebraska. The third-party defendants' motion for summary judgment on the issue of fraud will be granted.

The foundry also alleges the defendants violated the Nebraska Uniform Deceptive Trade Practices Act (the Act), Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.), specifically § 87-302(a)(5) which states

> A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she: . . . (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have . . ..

The nature and wording of the Act, and especially the 14 enumerated deceptive trade practices found at § 87-302, reveal that the act is concerned with such practices as they relate to goods and services. Representations as to the legal powers of a municipal government or a municipal utility do not conform to the relevant definition of goods and services. See, Neb. U.C.C. § 2105(1), defining "goods" as "all things . . . which are movable at the time of identification to the contract for sale . . .." I decline the third-party plaintiff's invitation to extend the Act so as to include the third-party defendants' actions in this case as deceptive trade practices. Neither the foundry nor I can find any legal support for such an argument. The third-party defendants' motion for summary judgment on the issue of violation of the Nebraska Uniform Deceptive Trade Practices Act is granted.

Conclusion

IT IS ORDERED, for the aforementioned reasons, the plaintiff's motion for summary judgment (filing 88) on the first, second, and fourth causes of action in the plaintiff's

third amended complaint (filing 48) is denied, and the third-party defendants' motion for summary judgment (filing 92), relating to the third-party plaintiff's third cause of action in its third amended complaint (filing 48), is granted.

Dated March 20, 1991.

BY THE COURT

WARREN K. URBOM
Senior United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
an Iowa Corporation,	*
	*
Appellant,	*
	*
vs.	*
	*
City of South Sioux City,	* Appeal from the
Nebraska, a Municipal Corporation,	* United States
	* District Court for the
	* District of Nebraska
Appellee,	*
	*
Ernest Albertsen; et. al.	*
Third-Party Defendants.	*

Submitted: December 12, 1991

Filed: July 10, 1992

Before MAGILL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

In 1968, Sioux City Foundry Company ("SCF") contracted with South Sioux City, Nebraska, to purchase electricity from the City owned utility at a special rate. In April 1989, after determining that the special rate was failing to cover its wholesale power costs, the City declared the contract null and void and began billing SCF at a significantly higher rate. SCF, a citizen of Iowa, brought this diversity suit to enforce

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*The HONORABLE DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

the contract and appeals the district court's determination that the contract is ultra vires and unenforceable. Concluding that the contract was within the City's delegated powers, we reverse.

I.

In 1968, SCF wanted to build a new plant for its casting division, and South Sioux City was anxious to attract new industry. The City urged SCF to build the plant in South Sioux City and offered to provide electricity from its municipally owned distribution system at a favorable rate. Because it had no other power customer of comparable size, the City devised an appropriate large-user rate with the help of its wholesale supplier, Consumers Public Power District (CPPD).

At a meeting on Christmas Eve 1968, the City Council approved by resolution a contract under which the City would provide electricity to SCF's new plant at a Special Foundry Power Rate (the Foundry Rate). The contract term

was twenty-three years, the length of CPPD's franchise to supply power to the City. The contract included rate-escalation provisions permitting the City to pass on increases in its wholesale electricity costs. Following City Council approval, SCF announced that it would build the million-dollar plant in South Sioux City. The parties signed a written contract and SCF completed the plant in 1969.

The contract was substantially modified in 1977, reflecting the City's determination that the rate-adjustment provisions were inadequate. SCF agreed to increase the base rate and to amend the rate-escalation provisions, and the City agreed to extend the term of the contract until September 16, 2002. The Foundry Rate was adjusted annually in accordance with this 1977 addendum until 1989.

By the late 1980s, the Foundry Rate had become less favorable to the City because the demand charges it was paying to its supplier, now the Nebraska Public Power District, had escalated dramatically, while the City's demand charges to SCF were fixed for the length of the contract in the

1977 addendum.[1] Moreover, when more sophisticated meters were installed, the City determined that SCF's peak demand periods largely coincided with the City's, which increased the City's cost of power.[2]

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[1]The City's wholesale rate, like the Foundry Rate, consisted of "demand" and "energy" components. However, the demand component was a much larger proportion of the City's wholesale rate, which exacerbated the impact of the City incurring increasing wholesale demand charges after it agreed to a fixed demand charge in the Foundry Rate. Under the 1977 addendum, the rate escalation provisions apply only to the energy component of the Foundry Rate.

[2]In the last paragraph of the contract, SCF agreed "to cooperate with the city, whenever possible to prevent their demand peak from reaching its highest point at the same time as the city demand peak." The record does not reflect any effort by the City to enforce this clause.

In March 1989, City Attorney Wayne Boyd opined that the contract would be invalid if the City's consultant concluded that the Foundry Rate was "not fair, reasonable and adequate to return the cost of service to the City, with a reasonable return for capital, construction and payment of indebtedness."

That same month, the City's consultant reported that, "For fiscal year 1988, the cost of service [under the contract] was $537,004 compared to revenues received of $337,301." At a meeting on April 4, 1989, the City Council passed a motion declaring the SCF contract "null and void." The City then began billing SCF at the "Large Light and Power" rate contained in the City's 1982 general rate ordinance. SCF's electricity charges have been, on average, about $20,000 per month higher under this rate than under the Foundry Rate.

In response, SCF protested and commenced this action. SCF's amended complaint seeks declaratory and injunctive relief and damages, alleging that the contract is valid, that the City breached the contract by declaring it null and void and by unilaterally implementing the Large Light and Power rate,

and that the City is estopped to deny the contract's validity. Following an evidentiary hearing, the district court preliminarily enjoined the City from attempting to collect the higher rates. Applying the preliminary injunction factors from Dataphase Systems, Inc. v. C L Svstems. Inc., 640 F.2d 109 (8th Cir. 1981), the court tentatively concluded, among other things, that SCF would probably prevail on the merits because the contract was a valid exercise of the City's proprietary powers.

SCF then moved for summary judgment. Reversing its previous position, the district court denied this motion and dissolved the preliminary injunction, concluding that there was no specific statutory authority for the contract, that a municipality may not contract away its legislative rate-setting power absent clear statutory authority, and therefore that the ccntract was ultra vires and void. SCF appeals the district court's dissolution of the preliminary injunction, an appealable order under 28 U.S.C. § 1292(a)(1).

Although the decision to grant or deny a preliminary injunction is generally subject to appellate review only for abuse of discretion, the parties argue legal rather than discretionary equitable issues on this appeal.[3] Both parties ask us to take up the district court's ruling that the 1968 contract is invalid, a question of law that we review de novo. See Bell v. Sellevold, 713 F.2d 1396, 1399 (8th Cir. 1983), cert. denied, 464 U.S. 1070 (1984).

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[3]During the pendency of this action, SCF has continued to pay at the Foundry Rate, but has escrowed the difference between that amount and the amount billed by the City. At one point, the City threatened to shut off SCF's power for nonpayment, but agreed in August 1990 to await a final decision on the merits, prompting the district court to deny an injunction pending appeal as unnecessary. Thus, the status quo is being effectively preserved.

II.

The parties present us with a narrow issue, whether the City in 1968 had the power to enter into a binding long-term contract specifying the rates SCF would pay for electricity purchased from the municipal distribution system. The parties agree that Nebraska law governs. South Sioux City, as a municipal corporation, has only those powers delegated to it by the State; these include powers "granted in express words; . . . those necessarily or fairly implied in or incident to the powers expressly granted; [and] those essential to the declared objects and purposes of the corporation." Jacobs v. City of Omaha, 147 N.W.2d 160, 163 (Neb. 1966).

In general, municipal powers are either legislative or proprietary. See 2 Charles Keating and Stephen Flanagan, McQuillin's Law of Municipal Corporations § 10.05 (3d ed. 1988). The distinction is important for two reasons. First, the grant of proprietary powers to act in the city's corporate capacity for the benefit of its residents "necessarily implies all the incidental powers to do anything that any business

man or corporation ought to do in operating a successful business enterprise." Nelson-Johnston & Doudna v. Metropolitan Util. Dist., 291 N.W. 558, 560-61 (Neb. 1940) (power to operate municipal electric utility includes power to sell appliances at retail). On the other hand, legislative powers are the acts of the sovereign and may only be exercised when expressly delegated by the state legislature. See Wabaska Elec. Co. v. City of Wymore, 82 N.W. 626, 627 (Neb. 1900) (municipality has no power to regulate private utility's rates absent statutory authority).

Second, and more germane to this case, while long-term contracts are a readily accepted method of exercising a municipality's proprietary powers, they are highly suspect in the legislative arena. See generally 56 Am. Jur. 2d, Municipal Corporations § 154 (2d ed. 1971). In Nebraska law, this is reflected in the axiom that, "A city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority." Seidel v. City of Seward, 133 N.W.2d 390, 392 (Neb. 1965). That axiom is the core of the

City's contention that its 1968 contract with SCF was ultra vires.

Nebraska cases have long recognized that, when a municipality enters into a long-term contract that fixes the rates at which electricity, gas, or water will be sold to its citizens, the municipality is exercising a power that may be proprietary, legislative, or both. Wabaska Elec. Co., supra, reflected the near-universal view that rate-making is a legislative function that must be expressly delegated by the State. City of University Place v. Lincoln Gas & Electric L. Co., 191 N.W. 432 (Neb. 1922), held that rate-making may be a proprietary function as well. There, the city entered into a long-term contract under which a private company constructed a gas works and sold gas in the city at prescribed rates. During the contract term, the company challenged the now-inadequate rates on the ground that the city had not been granted the power to regulate public utility rates at the time it entered into the contract. The court nevertheless upheld the contract, concluding that the power to prescribe rates was implicit in the city's proprietary power to contract for the

construction of the gas works. The court distinguished Wabaska as

> authority only upon the general proposition that a municipal corporation has no authority to exercise the governmental function of regulating rates to be charged by a public utility corporation unless expressly authorized by the Legislature, and the question there decided differs essentially from the one under discussion, which . . . involves the question of the power of the city to agree upon the charge to be made for the service for a reasonable period as a consideration for the granting of the franchise.

191 N.W. at 436 (emphasis in original).

More difficult issues of statutory construction arise when the legislature has delegated both the legislative power to fix rates, and the overlapping proprietary power to contract to buy or sell electricity. Most courts have held that these distinct governmental powers are not mutually exclusive and

therefore the contracting power to bargain on behalf of the city as buyer or seller is not extinguished or curtailed by the legislative power to regulate rates. As the Supreme Court said in St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352, 359-60 (1924):

> [I]n the present case . . . we think that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of [its legislative] authority . . . . One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract. its power to regulate the rates durinq the period of the contract is thereby suspended, and the contract is bindinq.

(Emphasis added.) See also Vicksburg V. Vicksburg Waterworks Co., 206 U.S. 496, 515-16 (1907); Trans World

Airlines, Inc. v. City Of San Francisco, 228 F.2d 473, 477 (9th Cir. 1955), Cert. denied, 351 U.S. 919 (1956) ("the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail"); Scott Paper Co. v. City of Anacortes, 578 P.2d 1292, 1297-98 (Wa. 1978). The Supreme Court of Nebraska explicity adopted this principle in City of University Place, 191 N.W. at 434 (if "the [rate] contract has the effect to suspend for a time the governmental power to regulate rates . . . this does not affect [the contract's] validity, if the time limit be reasonable, and the power to enter into the contract is found"). It was also implicitly recognized in Cornhusker Elec. Co. v. Citv Of Fairbury, 278 N.W. 379 (Neb. 1938).

We now turn to the specific Nebraska statutes that govern whether the City had the power to commit to the long-term Foundry Rate in the 1968 contract.

Nebraska is a public power State, so it is not surprising that its statutes grant cities of the first class[4] such as South Sioux City broad power "to purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate for the city . . . an electrical distribution facility," Neb. Rev. Stat. § 16-674, and to "do all acts necessary for the construction, completion, and management and control of same not inconsistent with law," § 16-684.[5] The City also has the general proprietary power "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers." § 16-201(4). In the absence of conflicting legislation, it is clear under Nebraska law that these statutes delegate the implied power to enter into long-term contracts with the City's

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[4]"First class" cities in Nebraska are those having between 5,000 and 100,000 inhabitants. Neb. Rev. Stat. § 16-101.

[5]See also § 18-412 (power to sell revenue bonds for this purpose); § 19-1401 ("power to purchase, construct, maintain and improve heating and lighting systems").

electricity customers that include rate terms. City of University Place, 191 N.W. at 434-35; Carr v. Fenstermacher, 228 N.W. 114 (Neb. 1929); Omaha Water Co. v. City of Omaha, 147 Fed. 1, 12-13 (8th Cir. 1906), appeal dism'd, 207 U.S. 584 (1907).

Since 1901 Nebraska cities of the first class have also been delegated the legislative authority to regulate the rates charged by both private and municipally owned electric utilities. See Neb. Rev. Stat. §§ 16-679, 16-681. The City argues that its legislative power to "regulate and fix" municipal electricity rates, § 16-681, when "the council shall by ordinance deem just or expedient," § 16-682,[6] deprived it

---

[6]The City conceded at oral argument that, if the 1968 contract was within the City's powers, it is irrelevant that the council approved it by resolution rather than by ordinance. This concession reflects the principle that estoppel cannot prevent the invalidation of an ultra vires contract, but may apply to a defect that is a mere formality. Warren v. Stanton County, 15 N.W.2d 757, 761-62 (Neb. 1944).

of any power to make a long-term rate contract with SCF. We disagree.

The City's rate regulation power is conferred in two separate statutes. Section 16-679, which authorizes the regulation of rates charged by private utilities, provides in relevant part:

> The mayor and council shall have power to . . . fix the rents or rates of . . . electric light or heat . . . . These powers shall not be abridged by ordinance, resolution or contract.

(Emphasis added.) Section 16-681, which applies to municipal utilities, provides that a city "owning, operating or maintaining its own . . . light or heat system . . . . shall regulate and fix the rental or rate for . . . light or heat." However, § 16-681 does not contain the "shall not be abridged" sentence of § 16-679. Both sections were enacted in 1901 in a comprehensive statute that included the grant of broad powers to own and operate nunicipal utilities, now

§ 16-684. See 1901 Neb. Laws, ch. 18, §§ 55, 57, 59. Read in pari materia,[7] this difference between § 16-679 and § 16-681 plainly reflects the Legislature's intent to authorize a city to suspend ("abridge") its legislative rate-making power by contract when the contract is on behalf of a municipal utility, but not when the contract is between the city and a private utility.

This construction is consistent with the general principles articulated in older cases such as St. Cloud Pub. Serv. Co., 265 U.S. at 360. It is also consistent with the Nebraska Supreme Court's most recent decision on this subject, T.V. Transmission, Inc. v. City of Lincoln, 374 N.W.2d 49 (Neb. 1985). Lincoln's municipal utility sought to renege on its twenty-year contract with a cable television firm permitting

---

[7]"It is a general rule that statutes pertaining to the same subject-matter should be construed together, and this is particularly so if the statutes were passed at the same session of the Legislature." Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 533 (Neb. 1919).

the firm to string wires on the city's utility poles for an annual rental of $3 per pole. Like South Sioux City, Lincoln argued that the contract was ultra vires because it "usurped" the statutory rate-setting authority of city officials. The Supreme Court disagreed:

> There is no claim in this case that [Lincoln] has no power to allow the use of its poles for a fee. A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any circumstances or for any purpose.
>
> [Lincoln's] argument is really not that it had no power to enter into the contract but that 20 years is too long to have to live with the same terms. In effect, [Lincoln's] argument is that in retrospect it finds it made a bad bargain.

374 N.W.2d at 54-55 (citation omitted).

South Sioux City attempts to distinguish T.V Transmission on the ground that Lincoln was setting rates for an "incidental

fee," not the delivery of electric service. However, the court in T. V. Transmission made no such distinction. Instead, it narrowly construed the axiom upon which the City relies, that "a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority," Id. at 54. Our reading of T.V. Transmission is consistent with older Nebraska cases such as City of University Place. Together, these cases conclusively support our view that the difference between § 16-679 and § 16-681 reflects a legislative intent to grant the City power to enter into a long-term rate contract on behalf of its municipal utility.

Finally, this construction of the statutes reflects the substantive difference between rate regulation of private and municipal utilities. When a municipality fixes rates for its own system, it sits on both sides of the rate-making table. Its decisions are subject to public interest considerations that could reasonably persuade the Legislature to grant the power to enter into long-term rate contracts. For example, in 1968 the City wanted SCF to locate its new plant in South Sioux

City. As one Council member commented at the Christmas Eve 1968 meeting, "I feel if we don't make a penny even to have the industry, we're making money." SCF needed a long-term commitment of electric power at reasonable rates. The City took sophisticated steps to protect itself by enlisting help from its supplier in devising the initial rate formula, and by rewriting the complex rate-escalation clauses in the 1977 addendum. Like Lincoln in T.V. Transmission, the City's real argument here "is that in retrospect it finds it made a bad bargain." That does not make the 1968 contract ultra vires.

Accordingly, we conclude that the City's 1968 contract with SCF was not ultra vires and therefore the district court erred in dissolving the preliminary injunction on this ground. We reverse and remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
an Iowa Corporation,	*
	*
Appellant,	*
	*
vs.	*
	*
City of South Sioux City,	* Appeal from the
Nebraska, a Municipal Corporation,	* United States
	* District Court for the
	* District of Nebraska
Appellee,	*
	*
Ernest Albertsen; Keith Ferris;	*
Wayne Boyd; Don McKinney;	*
Richard Petersen; Jack Bobier;	*

Merrill Downhour; Wayne Shanks; *

Harold Pilgrim; Jerry Curry *

Frank Boeshart; Vern Larson; *

Don Lahann; Dennis Nelson, *

Third-Party Defendants. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

July 10, 1992

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 9/17/92

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
Appellant,	* Order Denying
	* Petition for
vs.	* Rehearing and
	* Suggestion
City of South Sioux City,	* for Rehearing En
Nebraska,	* Banc
Appellee.	*

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 3, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-1068

In The

Supreme Court of the United States

October Term, 1992

CITY OF SOUTH SIOUX CITY, NEBRASKA,
a Municipal Corporation,

Petitioner,

vs.

SIOUX CITY FOUNDRY COMPANY,
an Iowa Corporation,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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6S PP

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals was correct in its determination that the long term power supply contract between the City of South Sioux City, Nebraska ("City"), and the Sioux City Foundry Company ("Foundry"), is a valid and enforceable agreement.

(2) Whether the power vested in the City to fix and regulate the rates it charges for electric service it supplies to its citizens through the City owned and operated electric utility is proprietary or legislative in nature.

(3) Even if the power to fix its own electric rates is legislative in nature, whether the Legislature authorized the City to contract with customers respecting municipal electric rates.

TABLE OF CONTENTS

Pages

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 6

Reasons Why The Writ Should Be Denied 8

Conclusion 24

Appendix.....App. 1

TABLE OF AUTHORITIES

Pages

Table of Cases Cited

City of University Place v. Lincoln Electric L. Co., 191 N.W. 432 (Neb. 1922) 18

Consumers Coal Co. v. City of Lincoln, 189 N.W. 643 (Neb. 1922) 8

Falldorf v. City of Grand Island, 292 N.W. 598 (Neb. 1940) 8, 9

Freeport Water Co. v. Freeport City, 180 U.S. 587 (1901) 17, 18

Halstead v. Rozmiarek, 94 N.W.2d 42 (Neb. 1959) 8

Hoover v. Carpenter, 197 N.W.2d 11 (Neb. 1972) 19

Kansas-Nebraska Natural Gas Co. v. City of St. Edward, 91 N.W.2d 69 (Neb. 1958) 17

K N Energy, Inc. v. City of Scottsbluff, 447 N.W.2d 227 (Neb. 1989) 17

Nelson-Johnston & Doudna v. Metropolitan Util. Dist., 291 N.W. 558 (Neb. 1940) 16, 17

Omaha Water Co. v. City of Omaha, 147 F. 1 (8th Cir. 1906) 18

Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 215 S.E.2d 552 (N.C. 1975) 19

Read v. City of Scottsbluff, 297 N.W. 669 (Neb. 1941) 17

South Shell Investment v. Town of Wrightsville Beach, 703 F.Supp. 1192 (E.D.N.C. 1988) 19

Speidell Monuments, Inc., et al. v. Wyuka Cemetery, No. S-90-171, slip op. (Dec. 31, 1992) 16

Springfield Gas & Electric Co. v. Springfield, 257 U.S. 65 (1921) 18

State v. Boettcher, 291 N.W. 709 (Neb. 1940) 17

TABLE OF AUTHORITIES – Continued

Pages

St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352 (1924) 18

T.V. Transmission, Inc. v. City of Lincoln, 374 N.W.2d 49 (Neb. 1985) 17

Town of Spring Hope v. Bissette, 287 S.E.2d 851 (N.C. 1982) 19

Wabaska Elec. Co. v. City of Wymore, 82 N.W. 626 (Neb. 1900) 16

TABLE OF STATUTES CITED

Neb. Rev. Stat. § 16-101 (Reissue 1991) 8

Neb. Rev. Stat. § 16-201 (Reissue 1991) 8, 9, 12, 15

Neb. Rev. Stat. § 16-674 (Reissue 1991) 9

Neb. Rev. Stat. § 16-679 (Reissue 1991) ..... *passim*

Neb. Rev. Stat. § 16-681 (Reissue 1991) ..... *passim*

Neb. Rev. Stat. § 16-682 (Reissue 1991) 16

Neb. Rev. Stat. § 16-686 (Reissue 1991) 14

Neb. Rev. Stat. § 19-2701 (Reissue 1991) 14

Neb. Rev. Stat. § 70-408 (Reissue 1990) 13

Neb. Rev. Stat. § 70-501 (Reissue 1990) 14

OTHER AUTHORITY CITED

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Nebraska State Legislature, *Nebraska Blue Book* (1990-91) 23

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STATEMENT OF THE CASE

A. Introduction.

In this action, the Respondent, Sioux City Foundry Company ("Foundry"), an Iowa corporation, sought judgment in the District Court that a long term power supply contract it made with the Petitioner, South Sioux City, Nebraska ("City" or "South Sioux"), was valid and binding on the City. The District Court ruled that it was not, denying the Foundry's motion for summary judgment and dissolving a preliminary injunction the Foundry had previously obtained in order to restrain the City from fulfilling its threat to disconnect electric service to the Foundry.

The Foundry appealed the District Court's ruling to the U.S. Court of Appeals for the Eighth Circuit. On appeal, the panel reversed the District Court, finding that the parties' contract was valid and enforceable. The City's motion for rehearing was denied by the Eighth Circuit Court. The City has petitioned this Court for writ of certiorari.

The issue presented on appeal is whether the City had the requisite authority to enter into a contract with the Foundry for the provision of electric light and power service to the Foundry by the City-owned and City-operated utility company. As such, this appeal is concerned solely with the laws and statutes of the State of Nebraska as they relate to the powers conferred upon cities of the first class (i.e., cities having between 5,000 and 100,000 inhabitants) in the ownership and operation of electric utility service companies. Jurisdiction in the federal court was premised upon diversity of citizenship of the parties.

B. Fact Statement.

The Foundry was originally established in 1871, in Sioux City, Iowa, and continues to maintain its primary place of business there. At some time prior to or during 1968, management determined that the metal-casting division of the Foundry should be converted from coal-fired furnaces to an all-electric plant. Because the cost of electricity would be a significant operating expense for an all-electric plant, the decision was made to build a new metal-casting facility, rather than to remodel the existing one, and to locate the new facility in a geographical area which offered the lowest electric rate over an extended period of time.

Proposals for long-term electric rate contracts were received from a number of communities, including South Sioux City, Nebraska. In the case of South Sioux, Ernest Albertsen, then the Mayor of the City, initiated contact with Foundry President, Milton Galinsky, to discuss location of the Foundry in South Sioux. At that time, no other commercial or industrial concerns comparable to the Foundry were located in the City. The Mayor sought out the Foundry company because he believed the industry would be beneficial to the City's economy.

Over the next several weeks, a proposal for a rate was developed by the City, with the assistance of John McCarthy, an electric rate engineer who worked for the City's primary supplier, Consumers Public Power District ("CPPD"), and that rate proposal was communicated to and negotiated with Galinsky. The rate offered by South Sioux City was the most favorable proposal submitted to the Foundry. A contract was negotiated between the City

and the Foundry which incorporated that rate proposal. (A. 1-7)

In the text of the contract, the parties acknowledged the City's desire to have the Foundry locate within South Sioux and the Foundry's need to know and contract for present and future cost of electric service. *Id.* at ¶¶ 3, 7. The contract specified the rate then paid by the City to CPPD, and set out a rate, based upon the City's wholesale power rate, to be charged the Foundry once the facility was operational. *Id.* at ¶¶ 6, 12. The term of the agreement was to extend for twenty-three (23) years. *Id.* at ¶ 14. During the contract term, the Foundry's rate was to be modified to reflect the average changes in the wholesale price paid by the City to CPPD to purchase power. *Id.* at ¶¶ 14, 15.

Acting as City Attorney, Wayne Boyd drafted a resolution for the City Council's consideration approving the contract described above. On December 24, 1968, the South Sioux City Council met to discuss that contract and, upon Wayne Boyd's presentation of the resolution, voted to adopt the resolution approving it. The contract was executed by the Mayor, on behalf of South Sioux City, and by Milton Galinsky, on behalf of the Foundry.

Both parties performed under the contract, as originally written, until 1977. The Foundry acquired land from the City's South Sioux City Development Company and constructed its new metal-casting facility there, completing construction and beginning operations in or about 1969. The City provided electric, light and power service to the Foundry and charged the Foundry therefor, all in

accordance with the terms and conditions of the parties' agreement.

In September of 1977, the Foundry and the City entered into an addendum to the original contract which clarified the manner in which the Foundry's rate was to be annually adjusted and which extended the term of the parties' agreement for an additional twenty-five (25) years, i.e., to expire in 2002. (A. 8-31)

The same Wayne Boyd who represented the City in 1968, acting again as City Attorney, and Richard Raymond, an engineering consultant retained by the City, represented the City in the negotiations which culminated in the addendum and participated in the drafting of that document. In addition, Boyd appeared before the City Council and, with the City's engineer, Raymond, recommended to the City Council that the addendum be approved.

Both parties continued to perform under the contract, as modified by the addendum, until 1989. On April 4, 1989, the City Council voted to approve a resolution unilaterally declaring the parties' agreement null and void. The Council's action was ostensibly based upon an opinion letter authored by Wayne Boyd, the same City Attorney who had assisted in the negotiation and drafting of the addendum and had recommended that agreement and the original contract to the Council. Boyd opined that the contract and addendum were void because they purported to abridge the City's legislative authority to regulate rates charged for electric power

contrary to the provisions of Neb. Rev. Stat. § 16-679.[1] (A. 34) In fact, it is clear that the Council's action was motivated, in large part, by a report from an engineering consulting firm that the City was losing money on the provision of electric service to the Foundry.

Upon declaring the contract and addendum null and void, the City Council voted to classify the Foundry as a large light and power customer and to charge the Foundry for electric service according to the large light and power rate established by City ordinance. Application of the large light and power rate resulted in the assessment of charges for electric service which exceed, by approximately $20,000 per month, the charges that would have been levied pursuant to the parties' agreement.

The Foundry filed the instant action seeking a declaratory judgment that the contract and the addendum were and are valid, binding contractual obligations. The City counterclaimed seeking in excess of one and one-half million dollars which it claimed represented underpayments for electric, light and power service provided to the Foundry since 1969 not billed to the Foundry under the foundry rate provided for in the parties' agreements. In response, the Foundry initiated a third-party action, seeking indemnification from various city officials and representatives.

In the interim, the City proceeded to bill the Foundry for service at the large light and power rate. However, the

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[1] Even the City now concedes that § 16-679 is not applicable, and the City seeks to justify its actions through provisions other than that which it asserted at the time.

Foundry consistently paid for electric, light and power service at the rate provided in the parties' agreement. Upon initiation of the present action, the Foundry received assurances from the City that no action would be taken by the City to collect the disputed amounts due and, specifically, that no action would be taken to disconnect electric power supplied to the Foundry's South Sioux City facility during the pendency of the proceedings.

Subsequently, by letters, dated November 7 and November 16, 1990, the City notified the Foundry of the City's intention to renege on its promise not to shut off the power supply to the Foundry's facility. By motion, the Foundry requested that the Court temporarily enjoin the City, pending trial on the merits, from attempting to collect any amounts in excess of those allowable pursuant to the parties' contract for electric, light and power service, as modified, including, but not limited to, any action that would result in the discontinuance of service to the Foundry's South Sioux City, Nebraska, facility.

As noted previously, the Foundry was granted a preliminary injunction. However, the injunction was dissolved after the District Court denied the Foundry's subsequent motion for summary judgment. The Foundry appealed from those orders and prevailed. The City has petitioned this Court for review on writ of certiorari.

SUMMARY OF ARGUMENT

First, the Foundry contends that the state legislature has clearly authorized the City to contract with customers respecting electric rates to be charged by a municipally

owned and operated electric utility. The statute governing the power and authority of a first class city in the operation of an electric system that it owns is Neb. Rev. Stat. § 16-681. (A. 34-35) In declaring its contractual agreements with the Foundry null and void, the City relied upon and cited to Neb. Rev. Stat. § 16-679. (A. 34) The latter section contains a prohibition against abridging, by contract, the powers granted to a city therein. However, the former section, the one which is applicable to the present dispute, contains no such prohibition. The only way to reconcile these two statutory provisions, and other provisions affecting the powers of a city of the first class in the ownership and operation of an electric utility, is to conclude that Nebraska cities of the first class, like South Sioux, can enter into long term power supply contracts with customers like the Foundry.

Second, the Brief traces the development in the case law of a distinction between the characterization of a city's powers with respect to municipally owned and privately owned public utilities, respectively. In short, actions taken regarding municipally owned public utilities are proprietary in nature and actions taken regarding privately owned utilities serving a municipality under a franchise granted by the city are legislative in nature. Although this distinction parallels that contained in the Nebraska statutes, discussed previously, the Nebraska Supreme Court has never directly addressed the question of the City's differing roles in each capacity. For that reason, the City's current contention that the Eighth Circuit Court disregarded, or failed to apply, state law in concluding that the parties' contract is enforceable is completely without merit.

Third, in contending that public policy considerations support its position, and in portraying this controversy as something other than a local dispute concerning a question of state law which will affect only these parties, the City has misrepresented the facts and the evidence which would be before this Court should it agree to hear and decide this case.

REASONS THE WRIT SHOULD BE DENIED

I.

THE LEGISLATURE AUTHORIZED THE CITY TO CONTRACT WITH CUSTOMERS RESPECTING MUNICIPAL ELECTRIC RATES.

South Sioux is a city of the first class, as defined by the Nebraska Legislature. Neb. Rev. Stat. § 16-101 (Reissue 1991). As such, it is a body corporate and politic, "possessed of the usual powers of a corporation for public purposes as a convenient agency for exercising the authority that is entrusted to it by the state." Neb. Rev. Stat. § 16-201 (Reissue 1991); *Halstead v. Rozmiarek*, 94 N.W.2d 42 (Neb. 1959). (A. 32)

As a municipal corporation, the City possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. *Falldorf v. City of Grand Island*, 292 N.W. 598, 602 (Neb. 1940); *Consumers Coal Co. v. City of Lincoln*. 189 N.W. 643, 650 (Neb. 1922); 2 E. McQuillin, *Municipal Corporations* § 10.09 (1988). The corporate powers which a municipality may exercise are (1) those granted in express terms;

(2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable. *Falldorf*, 292 N.W. at 602; 2 E. McQuillin, *Municipal Corporations* § 10.09 (1988).

The corporate powers granted to cities of the first class are primarily contained in Article 16 of the Nebraska Revised Statutes. At § 16-674, cities of the first class are authorized to own and operate "an electrical distribution facility, electric or other light works." (A. 33) Pursuant to § 16-681, cities of the first class owning and operating municipal electric utilities have the power to regulate and fix the rental, rates, and charges for electric light and power service. (A. 34-35)

It is the City's contention in the instant case that the City cannot contract with respect to the corporate powers outlined in § 16-681. However, in contending that the powers conferred upon the City by § 16-681 are legislative in nature, the City has consistently omitted from its briefs and memoranda any reference to other sections of Article 16, and other articles of the state statutes, which clearly authorize the City to contract respecting § 16-681 powers.

First of those sections is § 16-201(4) which expressly provides that all cities of the first class have the power "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers." (A. 32) As previously noted, included among the City's corporate powers is the responsibility to fix rates and charges to be levied by the

municipally-owned electric utility. Moreover, the electric utility is clearly "the property and concern" of the City.

Second, only if the City has the power to contract with respect to rates and charges generally does the distinction, recognized by the Eighth Circuit Court in its recent Order, between § 16-679 and § 16-681 have any meaning. Briefly stated, § 16-679 empowers the mayor and council to fix rates and charges levied by a privately-owned *franchisee* providing utility service within city limits. (A. 34) That section expressly prohibits the abridgement of the powers granted therein "by ordinance, resolution or contract." Neb. Rev. Stat. § 16-679 (Reissue 1991). (A. 34)

In contrast, § 16-681, governing the City's power to fix rates charged by its municipally owned electric utility, contains no such prohibition. (A. 34-35) The absence of the prohibition against contract is significant because § 16-681 and § 16-679 were enacted at the same time and, with the exception of the deletion of the prohibition from § 16-681, the two provisions are virtually identical (e.g., the same powers are granted to the city in the two sections and very similar language is used to describe and define those powers).[2]

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[2] "It is a general rule that statutes pertaining to the same subject-matter should be construed together, and this is particularly so if the statutes were passed in the same session of the Legislature. The general principle is that the Legislature must be presumed to have in mind all previous legislation upon the subject, including statutes closely related." *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, 175 N.W. 531, 533 (Neb. 1919). *See* also *Indian Hills Comm. Church v. Co. Bd. of Equalization*, 412 N.W.2d 459, 465 (Neb. 1987); *Sun Ins. Co. v. Aetna Ins. Co.*, 98 N.W.2d 692, 699-700 (Neb. 1959).

The fact that the electric utility industry in Nebraska is publicly owned does not, as the City implies, eviscerate the distinction between a city's power to regulate the rates charged by franchisees, contained in § 16-679, and the city's power respecting rates it charges as a municipally owned electric system, contained in § 16-681.

First, §§ 16-679 and 16-681 govern utilities other than electricity. Utility industries in Nebraska, other than the electric power industry, are comprised of companies which are privately owned as well as those which are publicly owned. Many such utilities operate within municipal boundaries under the terms of a franchise. For this reason, if for no other, the distinction evident within the statutory structure cannot be ignored in the context of the present case just because the utility service involved is electricity.

Additionally, Nebraska became a "public power" state many years *after* §§ 16-679 and 16-681 were enacted. Sections 16-679 and 16-681 were first made a part of the Nebraska Statutes in 1901. Nebraska did not become a "public power" state until 1945, forty-four years later. See R.E. Firth, *Public Power in Nebraska: A Report on State Ownership* (1962). If the conversion of the electric utility industry from a combination of public and private ownership to exclusively public ownership was intended or considered by the Legislature to have abolished the distinction established in the state's statutes, the statutory provisions in question could have been, and arguably would have been, amended to reflect that intention or consideration.

The only interpretation of §§ 16-681, 16-679 and 16-201(4) which will reconcile those provisions[3] and, simultaneously, give meaning to the express prohibition against contract contained in § 16-679[4] is to conclude (1) that under § 16-201(4) the City has the general power to contract with respect to the rates charged by a public utility operated within its corporate limits (i.e., whether it is operated by the City or by a franchisee); (2) that the general power to contract with respect to rates charged by a franchisee is expressly eliminated by the prohibition contained in § 16-679; and (3) that, by virtue of the omission of any prohibition against contract from § 16-681, the Legislature evidenced its intent that the general power to contract applies to rate-making for municipally owned public utilities.[5]

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[3] Section 16-201(4) was part of the same legislative measure that contained §§ 16-679 and 16-681. 1901 Neb. Laws 226. Therefore, the rules of statutory construction, cited supra footnote 2, require that those provisions be construed together. "All statutes relating to the same subject are considered parts of an homogenous system; so, too, all statutes in pari materia must be taken together and construed as if they were one law and effect be given to every provision." *Sun Ins. Co. v. Aetna Ins. Co.*, 98 N.W.2d 692, 699 (Neb. 1959).

[4] "It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided." *Adkisson v. City of Columbus*, 333 N.W.2d 661, 664 (Neb. 1983).

[5] The City's construction, that it has no general power to contract with respect to rates charged, whether by franchisees or by the city-owned system, renders the prohibitory language contained in § 16-679 (i.e., "These powers shall not be abridged by ordinance, resolution or contract.") meaningless and offers

Finally, additional reference is made to the City's power to contract with respect to the corporate powers contained in § 16-681 in other portions of the Nebraska Statutes. Section 70-408 governs the rates which may be charged by electric companies, providing in relevant part as follows:

> All charges, made for electrical energy for . . . commercial . . . purposes by any . . . municipal corporation engaged in the sale of electrical energy in cities of the first class . . . shall be based on the amount of such energy actually furnished . . . together with such demand as may be registered . . . , *or as may be contracted for*, to such purchaser (emphasis added).

Neb. Rev. Stat. § 70-408 (Reissue 1990). (A. 37) This language, by its clear meaning, both endows and acknowledges the power of a city of the first class, like South Sioux City, to contract with customers for electrical service, including the rates to be charged.

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no explanation of the absence of that language from § 16-681. Moreover, the City's contention that it has no power to contract with customers of its utility is in direct conflict with its own ordinances. Article 7, § 3-702 of the South Sioux City Code contains the following:

> Without further formality, the making of application on the part of any applicant or the use or consumption of electric energy by present customers and the furnishing of electric service to said applicant or customer *shall constitute a contract* between applicant or customer and the Municipality, to which both parties are bound (emphasis supplied).

(A. 39) The statutory source or authority cited by the City in support of this ordinance is Neb. Rev. Stat. § 16-681. *Id.*

The provisions found at Neb. Rev. Stat. §§ 19-2701, 70-501 and 16-686 are also significant. (A. 35-36; 38-39) Those statutory provisions expressly grant the City the authority to contract with respect to electric light and power service, including the rates charged therefor, with customers located *outside* the corporate boundaries of the City. At least two observations about this statutory scheme are important to underscore. First, by enacting statutes expressly permitting long-term power contracts between cities of the first class owning and operating electric utilities and customers located outside the corporate limits of such cities, the Legislature has expressly rejected the City's contention that it is contrary to public policy for a city council to impair, by contract, a future council's authority to regulate a customer's rates.

Second, the City's express power to contract with customers located outside its corporate limits implies the power to contract with customers located inside the corporate limits. It is rare for a city to have the power to do outside its corporate boundaries what it is not authorized to do within them. In fact, the general rule is that, unless the right to exercise a power outside the boundaries has been delegated to a municipality, the powers of a municipal corporation are limited by its boundaries and cannot be exercised beyond them. 2 E. McQuillin, *Municipal Corporations* § 10.07 (1988). The City's denial that it has the power to contract with customers, like the Foundry, located within City limits would create the anomalous result that the contract and addendum in question in these proceedings would be valid or invalid, not on the basis of their content and purpose, but upon the basis of

where the Foundry was ultimately located. The Legislature could not have intended such an irrational result.

In summary, it is clear that even if the powers conferred upon the City to regulate and fix rates under § 16-681 are considered legislative in nature, those powers are among the corporate powers the Legislature has expressly authorized the City to exercise by contract. This interpretation of §§ 16-201(4), 16-679 and 16-681, unlike that advocated by the City, simultaneously reconciles those provisions and gives effect to every part contained therein. Moreover, the power of a city of the first class to contract with respect to the rates charged by a municipally owned utility is clear when meaning is accorded to all the language of the relevant state statutes and when all the statutes relevant to the topic are read together.

II.

IN ARGUING THAT ITS POWER TO CONTRACT WITH THE FOUNDRY MUST BE EXPRESS, RATHER THAN IMPLIED, THE CITY ERRONEOUSLY ASSUMES ITS POWER TO CONTRACT RESPECTING THE PROVISION OF ELECTRIC SERVICE TO THE FOUNDRY IS LEGISLATIVE, RATHER THAN PROPRIETARY, IN CHARACTER.

The City's sole argument in support of its Petition for Writ of Certiorari in this case is that, in order for it to have had the authority to enter into a contract with the Foundry, the Nebraska Legislature must have first enacted a statute expressly providing to the City the power to contract with customers for electric service from the City-owned utility. However, this argument is based

upon the erroneous assumption that the power in question is legislative or governmental, rather than proprietary, in nature.

As the Eighth Circuit Court recognized in its July 10, 1992, Order, the grant of proprietary powers to act in a city's corporate capacity for the benefit of its residents "necessarily implies all the incidental powers to do anything that any business man or corporation ought to do in operating a successful business enterprise." *Nelson-Johnston & Doudna v. Metropolitan Util. Dist.*, 291 N.W. 558, 560-61 (Neb. 1940).[6] However, legislative powers are the acts of the sovereign and may only be exercised by a municipality when expressly delegated to the municipality by the state legislature. *Wabaska Elec. Co. v. City of Wymore*, 82 N.W. 626, 627 (Neb. 1900).

Throughout these proceedings, the City has placed great weight upon language contained in Neb. Rev. Stat. § 16-682 providing that a city council has the power to fix and collect such rates for electric service as the "council shall by ordinance deem just or expedient." The City's emphasis upon this provision arises from its apparent conviction that any action taken by a City by and through the enactment of an ordinance *must*, by definition, be

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[6] This principle was just reaffirmed by the Nebraska Supreme Court in its decision of *Speidell Monuments, Inc., et al. v. Wyuka Cemetery*, No. S-90-171, slip op. at 5 (Dec. 31, 1992) ("[W]here a public . . . corporation acquires property with the right to operate that property for the benefit of the public, the corporation will acquire by implication the right to do all the things a private owner might do in order to economically and efficiently furnish to the public the services in which the corporation deals.").

legislative in nature. That conviction is without basis in the law.

It is the character of the action and the purposes for which that action is taken, rather than the form of the action, which determines whether an activity performed by a municipality is legislative or proprietary in nature. A municipality may exercise either class of power by motion, resolution, or even by ordinance. The form or name of the action does not determine the nature of the step taken. *Read v. City of Scottsbluff*, 297 N.W. 669, 671 (Neb. 1941).

It is a well-established principle that the municipal ownership and operation of an electric utility company is conducted pursuant to a city's proprietary powers. *T.V. Transmission, Inc. v. City of Lincoln*, 374 N.W.2d 49, 55 (Neb. 1985); *Nelson-Johnston & Doudna v. Metropolitan Util. Dist.*, 291 N.W. at 560; *State v. Boettcher*, 291 N.W. 709, 716 (Neb. 1940). The only exception to this general rule has been recognized in cases involving municipalities and privately-owned public utility companies given a franchise by the municipality to provide utility service to the city's inhabitants. *Freeport Water Co. v. Freeport City*, 180 U.S. 587 (1901); *Kansas-Nebraska Natural Gas Co. v. City of St. Edward*, 91 N.W.2d 69 (Neb. 1958); *K N Energy, Inc. v. City of Scottsbluff*, 447 N.W.2d 227 (Neb. 1989). In such cases, the power of a city to fix and regulate the rates charged by the franchisee is considered legislative. *Freeport*, 180 U.S. at 599; *Kansas-Nebraska Natural Gas Co.*, 91 N.W.2d at 73; *K N Energy, Inc.*, 447 N.W.2d at 232.

Without exception, the ultimate determination that a city's power respecting rates in franchise cases is a

legislative function is attributed to the *regulatory* aspect of that power. *Freeport*, 180 U.S. at 599; *Omaha Water Co. v. City of Omaha*, 147 F. 1, 6 (8th Cir. 1906). In the franchise context, a city functions as a buffer between the consumer and the privately-owned, for-profit company given an exclusive license by the city to supply utility services to city residents. From a public policy standpoint, the regulatory function of a city in the franchise context is to protect the public interest in having a constant and affordable energy supply by ensuring that the rates charged by the franchisee are fair, reasonable and non-discriminatory. *Omaha Water Co.*, 147 F. at 6.

The same public policy considerations are not present when a municipality acts with respect to the rates it will charge for services rendered by a utility it owns. The regulatory aspect of the function is absent because a city, as proprietor, is already responsible to its citizens and ratepayers to provide the service at the lowest possible price and on otherwise fair, reasonable and non-discriminatory terms. *Springfield Gas & Electric Co. v. Springfield*, 257 U.S. 65, 70 (1921). The municipal utility pays no dividends and exists exclusively for the benefit and convenience of the citizens, not for the profit of the city. *Id.* Consequently, the power of a city to fix rates by agreement, and to otherwise contract with respect to the operation of a city-owned utility, is wholly proprietary in nature. *Omaha Water Co.*, 147 F. at 6; *City of University Place v. Lincoln Electric L. Co.*, 191 N.W. 432; 434 (Neb. 1922); *St. Cloud Pub. Serv. Co. v. City of St. Cloud*, 265 U.S. 352, 359-60 (1924). See, also, 12 E. McQuillin, *Municipal Corporations* § 34.144 (1988).

In the present case, the City has consistently refused to recognize this distinction between municipal action regarding the operation of its own utility and municipal action regarding the operation of a utility by a franchisee. Rather, the City erroneously assumes ratemaking is always a legislative function and, therefore, it is unnecessary to analyze whether the regulatory aspect of the activity is present or absent. *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth.*, 215 S.E.2d 552, 555 (N.C. 1975); *Town of Spring Hope v. Bissette*, 287 S.E.2d 851, 853 (N.C. 1982); *South Shell Investment v. Town of Wrightsville Beach*, 703 F.Supp. 1192, 1206 (E.D.N.C. 1988). In support of its position, the City consistently cites cases involving contracts between municipalities and franchisees.

The City has not cited, nor can it cite, a decision by a Nebraska court which concludes that rate making by a city for its own utility is a legislative function. However, in *Hoover v. Carpenter*, 197 N.W.2d 11 (Neb. 1972), the Nebraska Supreme Court did address that issue. *Hoover* involved an attempt by the ratepayers of Grand Island, Nebraska, a city of the first class,[7] to repeal, by referendum, an increase in the rates charged by the municipally-owned electric utility which had been approved by the city council. *Id.* at 12. The city contended that the fixing and regulation of the rate was proprietary in nature and, thus, not subject to referendum. The ratepayers contended that the activity was legislative and, therefore, susceptible to change by referendum.

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[7] The City of South Sioux City is also a city of the first class.

The court expressly declined to decide the "apocalyptic" issue of whether ratemaking activity by a municipally-owned utility is always legislative or is always proprietary in nature. *Id.* at 13. Rather, the court identified and applied a series of factors which, in the opinion of the court, would determine, on a case by case basis, whether a particular activity could properly be characterized as legislative or proprietary. It concluded that only one of six factors supported characterizing ratemaking by a first class city for its own utility as "legislative." The other five factors pointed the opposite way, i.e., they supported the contention that ratemaking by a city for a city-owned utility is a proprietary function.

The Nebraska Supreme Court's decision in *Hoover* was contemporaneous with the City and Foundry's dealings with one another. In 1977 when the addendum was negotiated and signed, *Hoover* was the most current statement of Nebraska law concerning whether ratemaking by a first class city for its own utility is proprietary or legislative. The decision indicated that the activity was proprietary, and the Foundry was entitled to rely upon that characterization as an accurate statement of Nebraska law on the subject.

For the reasons outlined in this section of the Brief, it is clear that the City's current contention that the Eighth Circuit Court's ruling somehow disregarded or misapplied Nebraska law concerning the proprietary versus the legislative powers granted the City is unfounded. In fact, the opposite is true. The Eighth Circuit Court's decision was consistent with Nebraska law and not violative of *Erie v. Tompkins*.

III.

IN CONTENDING THAT PUBLIC POLICY CONSIDERATIONS SUPPORT ITS POSITION, AND IN PORTRAYING THE CASE AS SOMETHING MORE THAN A LOCAL DISPUTE OVER A QUESTION OF STATE LAW, THE CITY HAS MISREPRESENTED THE EVIDENCE AND THE RECORD BEFORE THIS COURT.

First, the City contends that it is providing electric service to the Foundry at a loss and that, consequently, the rest of the City's ratepayers subsidize the Foundry operation. The Foundry has never conceded this point, nor has the City offered credible evidence to support its contentions in this regard.

The evidence does demonstrate that, as a result of the Foundry's performance of its obligations under the parties' contracts, the City has enjoyed the benefits of having a large industrial concern within city limits. Ernest Albertsen, the Mayor of South Sioux when the original contract with the Foundry was made, testified during his deposition that the City sought out the Foundry to locate in South Sioux in anticipation of the employment opportunities the company would provide for its citizens and the increased tax base such an industry would offer. When Albertsen contacted the Foundry, and during the time Albertsen, McKinney, and McCarthy[8] were negotiating the original contract on the City's behalf, there were no large commercial/industrial concerns located in South Sioux City. Even today, City officials concede that the

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[8] McKinney was an engineer employed by the City to advise it concerning its utility operation. McCarthy was an employee of the City's wholesale power supplier.

Foundry is more than fifty percent (50%) larger than any other commercial/industrial customer of the City-owned electrical system.

One inducement, if not the primary inducement, offered the Foundry in 1968 if it would locate in South Sioux City was an advantageous electric rate. In fact, the Foundry's reliance upon the contractual guarantee of a long-term, predictable electric rate was recited and acknowledged before the City Council at its December 24, 1968, meeting when the Foundry contract was approved and again in the text of the contract itself.

The City was clearly aware that the Foundry required a long-term commitment regarding electrical rates before it would agree to locate in South Sioux. That Milton Galinsky relied upon his contract with South Sioux in locating the Foundry facility in that City is equally clear. Milton Galinsky testified that he rejected a proposal from an Iowa utility, in the form of an offer to meet the rate contained in his contract with South Sioux, because that proposal was made and received after he had contracted with South Sioux.

The City admits that it has enjoyed all the benefits it anticipated the Foundry would bring to South Sioux. The Foundry has fully and completely performed all its contractual obligations. The City has received all it bargained for, but now wishes to repudiate the agreements which require the City's continued performance. Under such circumstances, it would certainly be inequitable and violative of public policy to allow the City to retract what its officers did in 1968 and reaffirmed in 1977 when the contract and addendum were approved, and what its

officers have done since 1968 in abiding by and performing under the parties' agreements.

Finally, the City has attempted to portray this dispute as one which will have far-reaching ramifications for Nebraska municipalities and public power districts, for such entities located outside the state, and for the consuming public. This is simply not true.

The sole issue in this case is whether this first class City had the requisite authority to contract with the Foundry for the provision of electric service to the Foundry by the City owned and operated utility. As a municipal corporation, the City derives its power through delegation. Therefore, the controversy can only be resolved by interpretation of the state statutes delegating to the City, and other cities of the first class, the power to own and operate a utility company.

The Nebraska state statutes discussed in this Brief, and in support of the City's Petition, affect only Nebraska cities of the first class. Other statutory provisions govern Nebraska cities and towns of smaller and larger size. Still other statutes govern the scope of the powers which can be exercised by public power districts within the state.

As recently as 1991, there were only twenty-nine (29) cities of the first class in existence in the State of Nebraska. *See* Nebraska State Legislature, *Nebraska Blue Book* (1990-91) at 785. Among those twenty-nine (29) cities, not all own and operate their own municipal electric systems. Among those that do, it appears that only one, South Sioux City, has ever entered into a long term power supply contract with a customer. Clearly, this case involves exclusively a very narrow question of state law

which, although very important to the parties immediately involved, will have no impact upon other Nebraska municipalities, public power districts, or the customers they serve.

CONCLUSION

For the reasons discussed herein, the Foundry respectfully requests that the Court deny the City's Petition for Writ of Certiorari.

SIOUX CITY FOUNDRY
COMPANY,
an Iowa corporation,

DOUGLAS L. CURRY, #10874
LINDA W. ROHMAN, #17984
ERICKSON & SEDERSTROM, P.C.
301 S. 13th Street, Suite 400
Lincoln, NE 68508
(402) 476-1000

APPENDIX

CONTRACT FOR ELECTRIC LIGHT AND POWER SERVICE

THIS AGREEMENT, made and entered into this 24th day of December, 1968, by and between The City of South Sioux City, Dakota County, Nebraska, (hereinafter referred to as the City), and Sioux City Foundry Company, a corporation, (hereinafter referred to as the Customer), WITNESSETH, that for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto acknowledge and agree with each other as follows:

1. That said Customer is considering erecting a new foundry plant on real estate located within the city limits of said city;

2. That there are not now nor has there ever been a similar business or foundry located in or near said city;

3. That said city is desirous of having customer locate its new plant in said city, but has never had an electrical power rate which would apply to such a customer;

4. That at the present time said city owns its own distribution system and purchases its power or electricity at a wholesale rate from Consumers Public Power District (CPPD) in Nebraska, and then retails the same to its customers in and near said city;

5. That at the present time said city has granted to CPPD a franchise to furnish said wholesale electricity to the city, which franchise will terminate in approximately twenty-three (23) years;

6. That the present rate schedule at which city buys electricity from CPPD is:

DEMAND CHARGE:

$1.75 per KWH per month of billing demand (based on the high 30 minute reading during the month).

ENERGY CHARGE:

1.30¢ per KWH for the first 25,000 KWH used per month;
.85¢ per KWH for the next 75,000 KWH used per month;
.70¢ per KWH for the next 200 KWH per KW of billing demand used per month;
.50¢ per KWH for the next 200 KWH per KW of billing demand used per month;
.30¢ per KWH for all additional use;

7. That before said customer can consider locating its plant in said city, it must know and contract the present and future cost of its electricity.

IT IS THEREFORE FURTHER CONTRACTED AND AGREED:

8. That the city will furnish electric service and electric energy to be used in the operation of customer's foundry plant, to be located in the vicinity of East 25th and "G" Streets in South Sioux City, Dakota County, Nebraska.

9. That the point of delivery of said electricity shall be at the city substation, located on customer's property, and at a site thereon to be agreed upon by the parties. Customer shall furnish an adequate site for said substation and right-of-way for ingress and egress thereto.

10. The electrical service furnished to customer by the city shall be in the form of three (3) phase, four (4) wire, sixty (60) cycle, alternating current, at approximately 480 volts.

11. The metering of said service shall be measured at 480 volts, by one (1) watthour meter and one (1) demand meter, installed at the point of delivery.

12. The customer shall pay the regular commercial rate for electricity used and metered during construction and until customer's plant reaches normal operation or until three months after their plant opens, whichever first occurs. This temporary regular commercial rate is defined as follows:

1st ----------25 kwh----------6¢ per kwh
Next ----------25 kwh----------5¢ per kwh
Next ---------950 kwh----------4¢ per kwh
Next--------4000 kwh----------3¢ per kwh
All over 5000 kwh----------2¢ per kwh

and thereafter City agrees to charge customer at a SPECIAL FOUNDRY POWER RATE, as follows:

DEMAND CHARGE:

1st 100 KW or less of the billing demand ------ $1.50 per KW
All over 100 KW ---------- .60 per KW

ENERGY CHARGE:

1.3¢ per kwh for the 1st 100 kwh per KW of billing demand
.8¢ per kwh for all additional use.

Also, customer shall be subject to a minimum bill each month after normal operations begin. This minimum bill shall be the monthly demand charge, but in no case shall it be less than $1,290.00 per month.

13. The Billing Demand for any month shall be the highest integrated kilowatt load during any 30 minute interval occuring [sic] in the billing period for which the determination is made, or sixty percent (60%) of the highest billing demand during the eleven preceding months; whichever is greater.

14. That the SPECIAL FOUNDRY POWER RATE above referred to shall remain in effect for a period of twenty-three (23) years from this date, or until the rate at which said City purchases under its wholesale rate schedule from CPPd [sic] shall change.

15. At the time that the rate schedule between the city and its supplier (CPPD or its successor) shall change, then said city shall compute its average cost of electricity over the past year under the old rate schedule from CPPD, by taking the total amount of money paid to CPPD, on a meter basis, and dividing by the number of kilowatt hours used during the last year. Then, the city shall compute the average cost over the same period and number of kilowatt hours, using the new rate schedule. Then from that time on until the next rate change, the city's rate to customer shall be adjusted up or down, in mills, to reflect the rate change, in mills, on the average cost, and shall be equal to the raise or reduction given to the city by CPPD, or its successors.

16. Customer shall be billed monthly from a demand meter and an energy meter, both furnished by

the city, and customer agrees to promptly pay said billings within twenty (20) days from the receipt thereof. Any neglect or refusal to pay said bills shall, at the option of said city, terminate this contract and all the provisions contained therein.

17. Customer shall be allowed a five percent (5%) discount of the energy charge where service is supplied at the city's primary distribution voltage through customer-owned transformers. If service is metered on the low voltage side, meter reading shall be divided by .98 before the rate is applied.

18. Customer shall be allowed a two percent (2%) discount of the energy charge where measurement is made on the high side of city-owned transformer. Where service is delivered through more than one bank of transformers, no discount will be made.

19. If customer operates equipment having a highly fluctuating or large instantaneous demand such as welders and X-ray machines, they shall be required to pay all non-betterment costs of isolating the load from the balance of the city's system so that the load will not unduly interfere with the service on the city's lines. In addition, if customer fails to provide adequate corrective equipment, they shall be required to own and maintain their own transformers.

20. As the customer's power factor, at the time of maximum demand is less than 90% lagging or leading, the City may at its own option adjust the demand to 90% by multiplying the billing demand by 90% and dividing by the customer's actual power factor (expressed in percent).

21. Customer agrees to co-operate with the city, whenever possible to prevent their demand peak from reaching its highest point at the same time as the city demand peak. This can be accomplished by changing the shifts during which the foundry plant operates.

IN WITNESS WHEREOF the parties hereto have set their hands and seals on the day and year first above written.

(SEAL)

ATTEST:

/s/ Semelda Hanrahan
City Clerk

ATTEST:

/s/ Harold B. Goldstein
Secretary

The City of South Sioux City, Nebraska

/s/ Ernest L. Albertsen
Mayor

Executed this 26th day of January, 1969, by

Sioux City Foundry Company

By: Milton L. Galinsky
President

STATE OF NEBRASKA)
ss.
COUNTY OF DAKOTA)

Now on this 24th day of December, 1968, before me, a Notary Public in and for said county and state personally appeared ERNEST L. ALBERTSEN and SEMELDA HANRAHAN, respectively the Mayor and City Clerk of the City of South Sioux City, Nebraska, known to me to be the identical persons which acknowledged the execution of the foregoing instrument and acknowledged the

same to be their voluntary acts and deeds and the voluntary act and deed of said municipal corporation.

WITNESS MY HAND AND OFFICIAL seal on the day and year last above written.

/s/ Wayne E. Boyd
NOTARY PUBLIC

My Commission expires:
August 26, 1970.

STATE OF Iowa)
SS.
COUNTY OF Woodbury)

Now on this 26th day of January, 1969, before me, a Notary Public in and for said county and state personally appeared Milton L. Galinsky and Harold B. Goldstein, respectively the President and Secretary of the Sioux City Foundry Company, a corporation, known to me to be the identical persons which executed the foregoing instrument and acknowledged the execution thereof to be their voluntary acts and deeds and the voluntary act and deed of said corporation.

/s/ Marvin S. Berenstein
Marvin S. Berenstein
NOTARY PUBLIC

My Commission expires:
July 4 1969

ADDENDUM AND MODIFICATION TO CONTRACT FOR ELECTRIC, LIGHT AND POWER SERVICE CITY OF SOUTH SIOUX CITY – SIOUX CITY FOUNDRY COMPANY

This Addendum and Modification is made this 16th day of September, 1977, to a certain Contract for Electric, Light and Power entered into between the City of South Sioux City, Dakota County, Nebraska, and Sioux City Foundry Company, on December 24, 1968, in mutual consideration of the agreements made herein for purpose of resolving ambiguities arising in the interpretation of said Contract.

I.

EFFECT OF ADDENDUM AND MODIFICATION

A. This Addendum and Modification is not intended to replace the original Contract, but only to modify the specific provisions thereof which are named herein, to-wit:

Paragraphs 12, 14, 15, 16 and 18.

All other provisions of the original Contract shall remain in full force and effect.

B. Any provision of this Addendum and Modification which is declared invalid, held void or rendered inoperable by action of law shall in no way affect the original Contract between the parties dated December 24, 1968, and any provision thereof otherwise modified

herein will be revived upon such happening. With respect to all other provisions of said Contract and this Addendum, this Addendum and Modification shall remain in full force and effect.

II.

DEFINITIONS

A. The following definitions shall apply in the interpretation of this Addendum and Modification:

Annual Review – Joint computation by City and Customer of rate changes or rate adjustments or both made annually in the month of January for purpose of fixing rate adjustments or rate changes or both to the Special Foundry Power Rate for the ensuing year effective with the January billing of said year. First annual review under this Addendum and Modification shall be held in January, 1978, and any rate change and/or rate adjustment shall be as of and effective on January, 1978, billing for the year of 1978.

Annual Review Agreement – Agreement reached by City and Customer at each annual review. Annual review agreement shall consist of three parts, *Part I* shall set forth the customer base rate, VCE base, Special Foundry Power Rate, and Line Item Rate Adjustment to the Special Foundry Power Rate, all as agreed at the last Annual Review. It shall include a list of agreed VCE, and the names of the suppliers to the City Pool of Energy, together with the percentage of power each supplied at the time of the last Annual Review. *Part II* of the Annual Review Agreement shall set forth all City rate changes, City rate adjustments, City VCE and a list of all

suppliers, together with percentage of energy furnished to the Pool of Energy by each during the previous 12 months of City contract with each of said suppliers. Effective date of each change or adjustment shall be noted. *Part III* of the Annual Review agreement form shall include all agreements reached at the current Annual Review and shall set forth the agreed Customer Rate Change and/or Rate Adjustment and the new Customer base rate, VCE Base, Special Foundry Power Rate and Line Item Rate Adjustment for use until the next review. It shall also set forth agreed VCE and a list of the suppliers to the City Pool of Energy together with the percentage of power estimated to be supplied by each. A format of this Annual Review Agreement with Part I completed as agreed by the City and Customer for use in the 1978 Annual Review, is attached hereto and made a part hereof and labeled "Exhibit A".

Base Rate – Per kilowatt hour cost of electricity to Customer at any point in time excluding all rate adjustments, but including all rate changes to that time. Base rate is altered by additions or reductions in the Energy Block only of Special Foundry Power Rate reflecting rate changes in the cost of electrical energy to City. Base Rate is the basic unit used in computing any change in Special Foundry Power Rate. Before Rate Changes on January 1, 1978, Customer Base Rate is:

.01659 + .002878419 =
$ .019468419 per KWH, Customer

Base Rate is further allocated in the Special Foundry Power Rate as follows:

Demand Block (To remain constant)

$3.00 per KW of billing demand

Energy Block (to accommodate all rate changes)

.01 - .0035(VCE) =
$ .0065 per KWH for the 1st 100 KWH per KW of billing demand.

.00922 - .0035(VCE) =
$ .00572 per KWH for all additional use.

City – The City of South Sioux City, Dakota County, Nebraska, a political corporation.

Contract – Contract for Electric, Light and Power Service between City and Customer dated December 24, 1968.

Contractual period – Period of City Contract with Customer or City with Supplier.

City Cost – Total net amounts paid by City for electrical energy from all suppliers supplying the City's Pool of Energy after subtracting all penalties and all credits, rebates, subsidies and other deductions whenever allowed and adding all adjustments and other additions including production cost adjustments. When City shall be the supplier of its own electricity, the costs to City shall be calculated on the same factors and in the same method as the Nebraska Public Power District Wholesale tariff is then calculated using equivalent City figures. Agreement as to what is equivalent must be made at the time the City is added as a Supplier.

a. If no equivalent City factor, either increasing or reducing its costs exists comparable to an existing NPPD factor,

the latter shall be ignored in the computation of the City costs.

b. If no NPPD factor equivalent to a City factor exists, then the parties shall agree on the propriety of inclusion in City's costs, *Provided*, that if no agreement is reached and such factor is included in any Nebraska, Iowa or South Dakota electric utility tariff computation, said factor shall be included, otherwise it shall be excluded.

Should the City supply any of its own electrical energy and not purchase all of the same from Suppliers, the cost per KW or KWH of either demand or energy block or both (as contemplated by Contract and Addendum and Modification) for City for the electricity it supplies to its Pool of Energy, shall not initially be higher than the lowest of the last prior contractual rates received by the City from any of its Suppliers or ever be higher at any point in time than the rates then currently offered by an equivalent source in the area during said rate period for the same load energy pattern adjusted for delivery to City if necessary.

City Rate – Rate charged at any point in time to City by Supplier.

Customer – Sioux City Foundry Company, an Iowa corporation, licensed to do business in the State of Nebraska.

Demand Block – That portion of the Special Foundry Power Rate for which a demand charge is made.

Energy Block – That portion of the Special Foundry Power Rate for which a charge is made

based on the actual amount of kilowatt hours used by Customer, consisting of 2 line items, the first of which is a charge for the first 100 KWH per KW of billing demand, and the second a charge per KWH for all additional use.

NPPD – Nebraska Public Power District.

PCA – Production Cost Adjustment – Present designation by City and NPPD of variable cost element (VCE) adjustments to City's Contract with NPPD covering uncertain costs such as fuel.

Pool of Energy – The total amount of energy available to the City from Suppliers and/or generated by City for distribution to users, including Customer.

Rate – Amount paid for electricity per kwh excluding all adjustments, includes total of Demand Block charges and Energy Block charges. *EXCEPTION:* Both City Rate and Special Foundry Power Rate for contractual period January 1, 1976, to January 1, 1978, include all adjustments.

Rate Adjustment – Addition or reduction to billing based upon variable cost elements agreed upon by Contract. When applied to Customer, it is a separate line item addition to or reduction from Customer billing by City, which increases or decreases the amount paid City by Customer for power, based upon variable cost elements agreed upon by Contract and computed annually at the annual review in January jointly by City and Customer as of that January and effective with that January billing.

Rate Change – Addition or reduction to rate at time of entering into a new rate contract or

modification of existing rate contract by the parties thereto. Specifically between City and Customer, this change is computed with reference to the rate change between City and Supplier and is an addition or reduction to the energy block of the Special Foundry Power Rate. Any rate change between City and Customer shall be made only once a year during the annual review and is computed at the first Annual Review following change in City Contract with Suppliers. All rate changes to the Foundry shall be made by equal adjustment in the two line items of the energy block.

Rebate – Reduction in rate which is returned to City from any source, or by City to Customer by immediate cash return or credit to current indebtedness.

Special Foundry Power Rate – Fixed amount per KW for demand and per KWH for energy charged Customer by City pursuant to Contract, Addendum and Modification. Customer billing is obtained by computing its energy consumption based first on the Special Foundry Power Rate and then adding or subtracting any adjustments thereto as a separate line item.

EXCEPTION: Special Foundry Power Rate for January 1, 1976, to January 1, 1978 *includes* all rate adjustments and rate changes in total billing to Customer on its electric consumption and as such is set out in full in Paragraph IIIA herein.

Supplier – Entity providing electricity to City's Pool of Energy. The term includes City should City supply any of its Pool of Energy.

Variable Cost Element (VCE) – Element of cost to the City for electrical energy not held constant for the contractual period with the City's Supplier, including credits, subsidies, or other deductions whenever allowed to the City for electrical energy from any source. This is the unit of cost used in computing any rate adjustment.

Variable Cost Element Base – Total Adjustments to Customer billing at any point in time to which future additions or reductions are made for variable cost elements. Customer Variable Cost Element Base is incorporated in the present Special Foundry Power Rate for the period January 1, 1976, to January 1, 1978. Before adjustments on January 1, 1978, Customer's Variable Cost Element Base will be .0035 per KWH for all use and after January 1, 1978, will be incorporated in billing as a separate line item. Variable Cost Element Base is to accommodate all rate adjustments.

III.

SPECIAL FOUNDRY POWER RATE,

RATE CHANGES AND RATE ADJUSTMENTS

Paragraph 12 of Contract is deleted and the following is substituted:

A. SPECIAL FOUNDRY POWER RATE: Under mutual agreement between City and Customer, beginning with January billing, 1976 through and inclusive of December billing, 1977, City agrees to charge Customer at a Special Foundry Power Rate as follows:

Demand Block

$3.00 per kilowatt of the billing demand

Energy Block

$.01000 per KWH of the 1st 100 KW of billing demand

$$\left(\frac{.0065}{} + \frac{.0035}{\text{(VCE Base)}}\right)$$

$.00922 per KWH for all additional use.

$$\left(\frac{.00572}{} + \frac{.0035}{\text{(VCE Base)}}\right)$$

The above Special Foundry Power Rate includes all rate changes, rate adjustments, and credits through and inclusive of January, 1976. The Demand Block Rate shall remain constant hereafter.

All rate changes and rate adjustments shall be made with reference to the Special Foundry Power Rate as follows: The above Special Foundry Power Rate, prior to any rate changes and/or rate adjustments in January, 1978, will be converted to the following format for billing purposes, and this format will continue through the life of this Contract and Addendum.

SPECIAL FOUNDRY POWER RATE

Demand Block (to remain constant)

$ 3.00 per KW of billing demand Energy Block (to accommodate Rate Changes)

$ .0065 per KWH for the 1st 100 KWH per KW on billing demand.

$ .00572 per KWH for all additional use.

Rate Adjustment Block (to accommodate Rate Adjustment)

$ .0035 per KWH for all use.

B. RATE CHANGE TO CUSTOMER: Special Foundry Power Rate set herein shall not be increased before January 1, 1978. Future rate changes in the Special Foundry Power Rate shall be computed and become effective as of the Customer's January billings next following the commencement of each new rate Contract between City and its Suppliers. However, rate change occurring when a Supplier is added to or deleted from the City's power pool (including the addition of City as a Supplier) resulting in more than one Supplier will be computed effective January billing of the second year following said addition or deletion. In any case, should the City supply any of its own electrical energy, cost to the City of the electricity it supplies shall be initially calculated as set forth herein and for purposes of rate change, City costs will be reviewed for the first time at the second annual review next following the year in which the City commenced to be a Supplier and every two years thereafter. Costs to the City will be those costs for the 12 months preceeding December 1 of the year prior to that in which the review is held.

C. RATE ADJUSTMENTS TO CUSTOMER: All rate adjustments will be made by an Annual Review each January. The purpose of this review shall be limited to

adjustment for variable cost elements that were part of the City's payments for electrical power during the previous 12 monthly periods. Any such adjustments to Customer rates shall be effective with the Customer's January billing following the last month reviewed. NO ADJUSTMENTS SHALL BE MADE TO THE SPECIAL FOUNDRY POWER RATE BETWEEN JANUARY 1, 1976, TO JANUARY 1, 1978, AS ALL ADJUSTMENTS HAVE BEEN INCORPORATED IN SAID RATE. For purposes of adjustment in the year 1978, that portion of the present City rate and the present Special Foundry Power Rate which is attributable to VCE is $ .0035, and this shall be Customer's Variable Element Cost Base for purposes of the January, 1978 annual review.

D. LIMITATION ON RATE CHANGE AND RATE ADJUSTMENT TO CUSTOMER: Special Foundry Power Rate shall not be changed more than once or adjusted more than once in any 12 month period, but one rate change or one adjustment or both to Special Foundry Power Rate shall be permitted annually as of January billing, 1978.

IV.

RATE CHANGE OR ANNUAL RATE ADJUSTMENT - SPECIAL FOUDRY [SIC] POWER RATE RECALCULATION AND CUSTOMER BILLING

Paragraph 15 of Contract is deleted and the following is substituted:

A. PROCEDURE FOR RATE CHANGE OR ANNUAL RATE ADJUSTMENT:

Procedure for rate change of Special Foundry Power Rate or rate adjustment of billing shall be as follows:

1. NOTICE TO CUSTOMER: City shall notify Customer in writing of any rate change or rate adjustment to City cost and the proposed rate change or rate adjustment to Customer's Base Rate, Special Foundry Power Rate or billing within 30 days of the first notice of effective date of any rate change or rate adjustment of cost to City by Supplier. City shall also notify Customer of any addition or deletion of Supplier and the percentage of the Pool of Energy furnished by said Supplier over the previous 12 months as well as by any percentage furnished by any Supplier changing its rate or VCE.

2. OBJECTION BY CUSTOMER TO RATE CHANGE, RATE ADJUSTMENT OR EFFECTIVE DATE: Upon notification of any rate change or adjustment to City and by City to Customer which Customer does not agree is a proper rate change, rate adjustment or effective date thereof to Customer under Contract, Addendum, and Modification, Customer shall, within 30 days of receipt of notice of such rate change or adjustment from City, notify City of its disagreement. In the event of such notification of disagreement of any notice given on or after October 1st, a moratorium of 90 days against imposition of such rate change or rate adjustment by City shall come into effect beginning with the date of first notification of said charge by the City to Customer. During this moratorium, the parties shall attempt to agree on modification of this Contract, Addendum and Modification to accommodate any change of costs to the City. Such negotiations shall not prejudice the position of City or Customer if no agreement is reached.

3. AGREEMENT AFTER OBJECTION: Any rate agreed upon by the parties after objection by Customer

shall go into effect as of the January billing next following the date of said notice or effective date of rate change or rate adjustment in City's Costs, whichever is later.

4. FAILURE TO AGREE FOLLOWING OBJECTION: If no agreement is reached by the parties after objection by Customer and negotiation during moratorium, effective day of the rate change or interim adjustment, if any is imposed, shall be determined independently of this clause, but shall not be earlier than the January billing following the date of notice by City to Customer.

5. LACK OF ACCEPTANCE IN WRITING BY CUSTOMER: Any rate change or rate adjustment increasing Customer costs made by City shall be null and void unless the Customer is notified as set forth herein. Any rate change or rate adjustment of which the Customer is given Notice as set forth herein shall not be implemented until the Customer accepts said rate change or rate adjustment and date in writing, or until ordered by Court of competent jurisdiction.

6. FAILURE TO NOTIFY CUSTOMER: If notice of rate change or rate adjustment and proposed effective date is not given to Customer by City as set forth herein, any increase in cost to Customer shall be waived by City, but any decrease in City's cost shall be retroactive for Customer rates to the January billing next following the date the decrease to the City occurred.

7. DUTY OF CITY TO FURNISH INFORMATION: The City agrees to furnish Customer with copies of each billing for electric and power from City's Suppliers as well as any documents reflecting adjustments, credits or rebates to City from any source. If City is a Supplier of

any portion of the Pool of Energy its costs of same shall be furnished Customer not less than once each quarter. Any additional data that is used in constructing Customer rates shall be transmitted to Customer within 10 days of receipt of same by City and, in any case on or before December 15, prior to any Annual Review at which same will be discussed.

8. CUSTOMER OPTIONS ON REBATE OR RETROACTIVE DECREASE: At Customer's option any rebate or retroactive decrease of Customer's rate either as a result of rate change or rate adjustment shall in the alternative, either be rebated or be applied to the Customer rate or annual rate adjustments commencing with January billing of the year following the last month of the 12-month period reviewed and shall be spread over the subsequent year.

9. REBATE:

1. City shall notify Customer of the nature, the gross amount and the amount per KWH of any rebate received from any source.

2. Any rebate to City by any source shall be immediately rebated to Customer unless alternative payment set forth above is requested by Customer.

B. METHOD OF RECALCULATING SPECIAL FOUNDRY POWER RATES AND CUSTOMER BILLING

Computation of Special Foundry Power Rate changes or rate adjustment shall be as follows:

Starting the month of January, 1978, and each January thereafter for the life of the contract, the City and Customer shall have an Annual Review for the purpose of considering rate changes or rate adjustments or both. Rate changes and/or adjustments computed at an Annual Review shall become effective with the billing for the January in which the Annual Review is held.

In all calculations, the data for the month immediately preceding the Annual Review shall be excluded and shall be replaced by data from the same month of the last prior year.

1. COMPUTATION OF RATE CHANGE IN SPECIAL FOUNDRY POWER RATE: The cost of electricity per KWH to the City's Pool of Energy under the old rate shall first be determined by taking that part of City cost paid to the Supplier changing its rate over the 12-month period prior to the rate change, excluding all variable cost elements and dividing that total by the number of KWH's used on a meter basis for which such cost [sic] were incurred. In case the old rate has not been effect for a 12 consecutive month period, the rate shall be applied as if it had been. Next, the cost of electricity under the new rate schedule shall be calculated for the same 12-month period and number of KWH's. The difference in cost per KWH up or down between the old and new rate schedules calculated above, multiplied by that fraction of the City's Pool of Energy for the 12-month period prior to the rate change that was supplied by the Supplier changing its rate, is the change to the Special Foundry Power Rate. In case of more than one rate change to the City by its Supplier(s), the change to the Special Foundry Power Rate for each of the rate changes to the City shall be

calculated separately. The total of the changes to the Special Foundry Power Rate for each of the rate changes to the City considered shall then be added to, or subtracted from the charges made to the Customer in both line items of the energy block.

EXAMPLE 1: The rate for electricity charged the City from its sole Supplier has been in effect for 2 years, and it will increase effective the January billing to the City. Over the 12 month period prior to the January of the rate change the City has been metered for 100,000,000 KWH from this Supplier. The total cost paid by the City excluding VCE for this 100,000,000 KWH is $2,000,000.00. The cost to the City Pool of Energy is $2,000,000.00/100,000,000 or $.020000/KWH. Using the new rate schedule, the City would pay $2,250,000.00 for the same 100,000,000 KWH's. Under the new rate schedule the cost to the City's Pool of Energy is $2,250,000.00/100,000,000 KWH or $.022500/KWH. The change to the Special Foundry Power Rate would be ($.022500/KWH minus $.020000/KWH) multiplied by 1.000000,* or $.002500/KWH upward.

*(Since the Supplier supplied 100% of the energy to the City Pool of Energy, for the 12 months prior to the rate change, the difference in cost per KWH between the old and new rates is multiplied by 1.000000 and the total change Special Foundry Energy Rate to apply is $.002500/KWH.)

The Special Foundry Power Rate is then changed as follows:

Demand Block

$3.00 per KW of billing demand (this remains constant).

Energy Block

$.0065

+ (summation of changes to Special Foundry Power Rate calculated at prior Annual Reviews, if any)

+ ($.002500) per KWH for the 1st 100 KWH per KW of billing demand

$.00572

+ (summation of changes to Special Foundry Power Rate calculated at prior Annual Reviews, if any)

+ $.002500) per KWH for all additional use.

2. COMPUTATION OF RATE ADJUSTMENTS TO CUSTOMER BILLING: The total amount paid by and credited to the City for Variable Cost Elements (VCE) during the previous 12 month period shall be divided by the total amount of KWH's used in the Pool of Energy on a meter basis. The average cost per KWH for VCE's so determined will be the rate adjustment charge to the Customer effective with the January billing after the last month of the 12 month period considered. It will be in effect for 12 months.

EXAMPLE 2: During a 12 month period prior to an Annual Review the City pays out a total of $350,000.00 for VCE's on a total of 100,000,000 KWH's supplied its Pool of Energy over the same period. The average cost per KWH for VCE's paid by the City during the period is

$350,000.00/100,000,000 KWH or $.003500/KWH. Effective in that January's billing the City shall bill the Customer a Line Item Rate Adjustment charge during the ensuing year as follows:

Rate Adjustment Charge

$.003500 per KWH for all use.

3. COMPUTATION OF RATE CHANGE TO SPECIAL FOUNDRY POWER RATE IN THE EVENT OF ADDITIONS OR DELETIONS OF SUPPLIERS TO THE CITY'S POOL OF ENERGY RESULTING IN MORE THAN ONE SUPPLIER: At the first Annual Review after 12 months of billing history to the City is available after change in the number of Suppliers, the cost to the Pool of Energy shall be reviewed. First, the total payments by the City to its Suppliers, excluding VCE's, for the 12 months immediately preceding any change will be divided by the total number of metered KWH's for which such payment was made. Next, the total payments by the city to its Suppliers, excluding VCE, for the 12 months immediately after the change will be divided by the total number of metered KWH's for which such payment was made. In case the rates charged by any Supplier were not in effect for a 12-month period considered, the final rate prior to the change or the first rate after the change shall be applied as if it had been in effect for the entire period. The difference in cost per KWH between the period prior to the change and the period after the change shall be the addition or reduction to the Special Foundry Power Rate because of the change.

This addition or reduction to the Special Foundry Power Rate will be added to or subtracted from the

charges made to the Customer in the energy block. Any rate change to the City within 12 months after change in number of Suppliers will be considered effective 12 months after the change in the number of Suppliers.

EXAMPLE 3: The City has changed from a single Supplier for its Pool of Energy to two Suppliers effective July of a given year. For the 12 months prior to that July the City had paid that Supplier $2,250,000.00 for 100,000,000 KWH's excluding VCE. The rate to the City had been in effect for the entire period. The average cost to the Pool of Energy prior to the change in the number of Suppliers is $2,250,000.00/100,000,000 KWH or $.022500/KWH. For the 12 months period following the change the City paid its Suppliers $2,150,000.00 for 100,000,000 KWH excluding VCE's. The rates the City paid during that period remained in effect for the entire period. The average cost to the Pool of Energy after the change is $2,150,000.00/100,000,000 KWH or $.0215000/KWH. The change to the Special Foundry Power Rate will be $.021500 per KWH minus $.022500 per KWH or $.001000 per KWH downward. The Special Foundry Power Rate is changed as follows:

Demand Block
$3.00 per KW of Billing Demand
(to remain constant)

Energy Block
$.0065
+ (summation of changes to Special Foundry Power Rate calculated at prior Annual Reviews, if any)

+ (-$.001000)
per KWH for the first 100 KWH
per KW of billing demand.

$.00572
+ (summation of change to Special Foundry Power Rate calculated at prior Annual Reviews, if any)

+ (-.001000)
per KWH for all additional use.

V.

BILLING PAYMENT AND TERMINATION

Paragraph 16 of Contract is deleted and the following is substituted:

A. BILLING AND PAYMENT: Customer shall be billed monthly from a demand meter and energy meter, both furnished by the City, and Customer agrees to promptly pay said billing within twenty (20) days after receipt thereof.

B. FAILURE OF PAYMENT BY CUSTOMER: In case of neglect or unreasonable refusal of Customer to pay said bills, City may, at is option, terminate Contract, Addendum and Modification, *Provided*, prior to said termination City shall give Customer ninety (90) days notice in writing of City's intention to terminate Contract, Addendum and Modification setting forth specifically the reasons therefor. Customer shall have thirty (30) days from receipt of said notice to correct any default or cure any complaints of City. Good faith disagreement by Customer that bills rendered by City are not computed in accordance with Contract, Addendum and Modification shall

not be grounds for termination of this Contract nor shall failure of Customer to pay any bills that the City shall *unilaterally* render or consider due in the face of objection from Customer and failure of Customer to agree to same in writing. Any intentional termination of power to Customer by City determined by a Court of competent jurisdiction to be not in good faith or in violation of this Contract shall render the City liable for loss of profits by Customer during said interruption projected on the average profits of Customer for similar months over the previous three years.

VI.

DISCOUNT

Paragraph 18 of Contract is deleted and the following is substituted:

Customer shall be allowed a two percent (2%) discount of the energy charged and adjustments, if any, charged per KWH where measurement is made on the high side of City owned transformer. Where services are delivered through more than one bank of transformers, no discount will be made.

VII.

TERM OF CONTRACT AND ADDENDUM AND MODIFICATION

Paragraph 14 of Contract is deleted and the following is substituted:

This Contract, Addendum and Modification shall be in effect for a period of twenty-five (25) years from date signing thereof which date is the 16 day of Sept., 1977.

CITY OF SOUTH SIOUX CITY, NEBRASKA.	SIOUX CITY FOUNDRY COMPANY
BY:	BY:
/s/ Keith Ferris	/s/ Milton L. Galinsky

SOUTH SIOUX CITY – SIOUX CITY FOUNDRY

EXHIBIT A – ADDENDUM AND MODIFICATION AGREEMENT DATED SEPTEMBER 16, 1977.

EFFECTIVE: January 1, 1976, to next review January, 1978.

PART I – PRESENT RATE AND FORMAT

Special Foundry Power Rate Demand Block (Constant)

$3.00 per KW of billing demand Energy Block (To accomodate rate change)

.0065 per KWH for the 1st 100 KWH per KW of billing demand

.00572 per KWH for all additional use

Rate Adjustment Block (To Accommodate Rate Adjustments)

.0035 per KWH for all use .01659 + .002878419 =

Customer Base Rate:	.019468419
VCE Base (Rate Adjusgment:	0035
Agreed VCE:	PCA
Suppliers (% pool):	NPPD (100%)

AGREED AND DATED THIS 16 DAY OF September, 1977.

PART II – CHANGES AND ADJUSTMENTS

Special Foundry Power Rate Demand Block (Constant)

$3.00 per KW of billing demand Energy Block (Rate change)

.____ per KWH for the 1st 100 KWH per KW of billing demand

.____ per KWH for all additional use

Rate Adjustment Block (To Accommodate Rate Adjustments)

.____ per KWH for all use

Customer Base Rate:	_____
VCE Base (Rate adjustment):	_____
Agreed VCE:	_____
Suppliers (% pool):	_____

CITY OF SOUTH SIOUX CITY

BY: /s/ Keith Ferris TITLE: _____

PART III – NEW RATE AND FORMAT

Special Foundry Power Rate Demand Block (Constant).

$3.00 per KW of billing demand Energy Block

.____ per KWH for the 1st 100 KWH per KW of billing demand

.____ per KWH for all additional use

Rate Adjustment Block (To Accommodate Rate Adjustments)

.____ per KWH for all use

Customer Base Rate: _____

VCE Base (Rate adjustment): _____

Agreed VCE: _____

Suppliers (% pool): _____

SIOUX CITY FOUNDRY

BY: /s/ Milton L. Galinsky TITLE: President

16-201. First-class city; general powers. Each city of the first class shall be a body corporate and politic, and shall have power (1) to sue and be sued; (2) to purchase, lease, lease with option to buy, or acquire by gift or devise, and to hold real and personal property within or without the limits of the city, and real estate sold for taxes for the use of the city in such manner and upon such terms and conditions as may be deemed in the best interests of the city; (3) to sell and convey, exchange, or lease any real or personal property owned by the city, including park land, in such manner and upon such terms and conditions as may be deemed in the best interests of the city; *Provided,* that real estate owned by the city may be conveyed without consideration to the State of Nebraska or to the Nebraska Armory Board for state armory sites, or if acquired for state armory sites, shall be conveyed in the manner strictly as provided in sections 18-1001 to 18-1006: (4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers; and (5) to exercise such other and further powers as may be conferred by law.

Source: Laws 1901, c. 18, § 8, p. 230; R.S. 1913, § 4816; C.S.1922, § 3984; C.S.1929, § 16-201; Laws 1935, Spec.Sess., c. 10, § 6, p. 74; Laws 1941, c. 130, § 12, p. 497; C.S.Supp.,1941, § 16-201; R.S.1943, § 16-201; Laws 1963, c. 60 § 1, p. 252; Laws 1965, c. 48, § 1, p. 248; Laws 1971, LB 5, § 1; Laws 1975, LB 150, § 1.

16-674. Acquisition of plants or facilities; condemnation; procedure. The mayor and city counsel shall have power to purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate for the city any such waterworks, gas works, power plant, including an electrical distribution facility, electric or other light works, or heating plant, or to condemn and appropriate, for the use of the city, waterworks, gas works, power plant, including an electrical distribution facility, electric or other light works, or heating plant. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724, except as to property specifically excluded by section 76-703 and as to which sections 19-701 to 19-707 are applicable. For purposes of this section, an electrical distribution facility shall be located within the retail service area of such city as approved by and on file with the Nebraska Power Review Board, pursuant to Chapter 70, article 10.

Source: Laws 1901, c. 18 § 54, p. 272; Laws 1904, c. 23, § 2, p. 244; Laws 1907, c. 14, § 1, p. 122; Laws 1909, c. 19, § 1, p. 184; R.S. 1913, § 4954; Laws 1917, c. 97, § 1, p. 260; Laws 1919, c. 38, § 1, p. 120; Laws 1921, c. 169, § 1, p. 661; C.S.1922, § 4123; C.S.1929, § 16-652; Laws 1931, c. 29 § 1, p. 118; C.S.Supp.,1941, § 16-652; R.S.1943, § 16-674; Laws 1951, c. 101, § 53, p. 471; Laws 1982, LB875, § 1.

16-679. Public utilities; service; duty to provide; rates; regulation. The mayor and council shall have power to require every individual or private corporation operating such works or plants, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, with gas, water, power, light or heat, and to supply said city with water for fire protection, and with gas, water, power, light or heat, for other necessary public or private purposes; to regulate and fix the rents or rates of water, power, gas, electric light or heat; and to regulate and fix the charges for water meters, power meters, gas meters, electric light or heat meters, or other device or means necessary for determining the consumption of water, power, gas, electric light or heat. These powers shall not be abridged by ordinance, resolution or contract.

Source: Laws 1901, c. 18, § 55, p. 273; R.S. 1913, § 4955; C.S. 1922, § 4124; C.S. 1929, § 16-653.

16-681. Municipal utilities; service; rates; regulation. Such city owning, operating or maintaining its own gas, water, power, light or heat system, shall furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, subject to reasonable rules and regulations, with gas, water, power, light or heat. It shall regulate and fix the rental or rate for gas, water, power light or heat, and regulate and fix the charges for water meters, power meters, gas meters, light meters or

heat meters or other device or means necessary for determining the consumption of gas, water, power, light or heat. It shall require water meters, gas meters, light meters, power meters, or heat meters to be used, or other device or means necessary for determining the consumption of gas, water, power, light or heat.

Source: Laws 1901, c. 18, § 57, p. 275; R.S.1913, § 4957; C.S.1922, § 4126; C.S.1929, § 16-655; Laws 1937, c. 23, § 1, p. 146; C.S.Supp., 1941, § 16-655.

16-686. Public utilities; rural lines; when authorized; rates. Said city is hereby authorized and empowered, for the purpose of carrying out the provisions of sections 16-684 and 19-2701, to construct, maintain and operate the necessary rural transmission and distribution lines for a distance of eighteen miles from the corporate limits of said city upon, along and across any of the public highways of this state under the conditions and provisions prescribed by law for the construction of electric transmission and distribution lines to persons, firms, associations or corporations. Before the construction of any such rural electric transmission or distribution lines shall be undertaken, such city shall enter into contracts for electric service with persons, firms, associations or corporations to be served at rates which will produce an annual gross revenue to such city equal to not less than fifteen percent of the cost of said construction. Such city shall thereafter adjust such rates when necessary to produce such gross revenue.

Source: Laws 1929, c. 43, § 1, p. 188; C.S. 1929, § 16-657; R.S.1943, § 16-686; Laws 1945, c. 22, § 1. p. 130.

(a) CONTRACTS

(Applicable to cities of the first or second class.)

19-2701. Public utilities; service outside city; authorization; limitation on length of contracts. A city of the first or second class may enter into a contract or contracts to sell electric, water, or sewer service to persons beyond the corporate limits of such a city when, in the judgment of the mayor and council of such a city not having a board of public works or of its board of public works in such a city having such board, it is beneficial to any such city to do so. No such contract shall run for a period in excess of twenty-five years. Such a city is hereby authorized and empowered to enter into contracts for the furnishing of electric service to persons, firms, associations, and corporations beyond the corporate limits of such a city.

Source: Laws 1909, c. 19, § 1, p. 186; R.S.1913, §§ 4959, 4960; C.S.1922, §§ 4128, 4129; Laws 1929, c. 43, § 2, p. 188; C.S.1929, §§ 16-657, 16-658; R.S.1943, § 16-685; Laws 1947, c. 26, § 4, p. 130; R.R.S.1943, § 16-685; Laws 1957, c. 53, § 1, p. 262.

70-408. Electric companies; rates; kilowatt-hour meter; demand meter; minimum charge authorized. All charges, made for electrical energy for residential, commercial, and farm purposes by any person, firm, corporation, or municipal corporation engaged in the sale of electrical energy in cities of the first class having a population of more than five thousand and less than twenty-five thousand inhabitants, cities of the second class, villages, and unincorporated areas in Nebraska, shall be based on the amount of such energy actually furnished by the kilowatt-hour meter, together with such demand as may be registered or indicated by a demand meter, or as may be contracted for, to such purchaser. Such person, firm, corporation, or municipal corporation may provide for either a penalty on or a discount from the amount of any bill to promote prompt payment thereof under uniform rules and regulations governing such penalty or discount. A reasonable minimum charge may be collected from purchasers of electrical energy by any such person, firm, corporation, or municipal corporation, even though the charge for the amount of electrical energy actually furnished by the kilowatt-hour to such purchaser or user does not equal such minimum charge for the designated period of service; *Provided,* the provisions of sections 70-407 to 70-409 shall not be construed to affect any contract or franchise in existence at the time of the passage and approval of this section.

Source: Laws 1933, c. 60, § 2, p. 292; C.S.Supp.,1941, § 70-506; R.S.1943, § 70-408; Laws 1949, c. 197, § 1, p. 576.

70-501. Extension authorized; electric energy; sale. Any city, village, or public electric light and power district within the state, which may own or operate, or hereafter acquire or establish, any electric light and power plant, distribution system and transmission lines may, at the time of or at any time after such acquisition or establishment, extend the same beyond its boundaries, and for that purpose is hereby authorized and empowered to construct, purchase, lease, or otherwise acquire, and to maintain, improve, extend and operate electric light and power plants, distribution systems and transmission lines, outside of the boundaries of such city, village, or public electric light and power district, for such distance and over such territory within this state as may be deemed expedient. In the exercise of the powers granted by this section any such city, village, or public electric light and power district may enter into contracts to furnish and sell electrical energy to any person, firm, association, corporation, municipality, or public electric light and power district. However, no such construction, purchase, lease acquisition, improvement or extension of any such additional plant, distribution system or transmission lines shall be paid for except out of the net earnings and profits of one or more or all of the electric light and power plants, distribution systems and transmission lines of such city, village, or public electric light and power district. The provisions of sections 70-501 to 70-515 shall be deemed cumulative, and the authority herein granted to cities, villages, and public electric light and power districts shall not be limited or made inoperative by any existing statute.

Source: Initiative Law 1930, § 324; Laws 1931, c. 116, § 1, p. 336; C.S.Supp., 1941, § 70-601.

3-702 Municipal Electrical System; Contracts and Terms. The Municipality through its Governing Body, shall furnish electric current for light and power purposes to persons whose premises abut on any supply wire of the distribution system and may furnish electric current to such other persons within or without its corporate limits, as and when, according to law, its Governing Body may see fit to do so. The rules, regulations, and rates for electric service, hereinafter named, in this Article, shall be considered a part of every application hereafter made for electric service and shall be considered a part of the contract between every consumer now served by the Electrical Department. Without further formality, the making of application on the part of any applicant or the use or consumption of electric energy by present customers and the furnishing of electric service to said applicant or customer shall constitute a contact between applicant or customer and the Municipality, to which both parties are bound. If customer should violate any of the provisions of said contract or any reasonable rules and regulations that the Electrical Department may hereafter adopt, the Superintendent, or his agent, shall cut off or disconnect the electric service from the building or place of such violation and no further connection of electric service for such building or place shall again be made save or except by order of the Superintendent or his agent. (*Ref.* 16-681 *RS Neb.*)